

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY AND
LONDON GUARANTEE & ACCIDENT COMPANY,
LTD., PETITIONERS,

vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER,
UNITED STATES EMPLOYEES' COMPENSATION
COMMISSION, 10TH COMPENSATION DISTRICT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 4, 1939.

CERTIORARI GRANTED OCTOBER 9, 1939.



IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. _____

SOUTH CHICAGO COAL & DOCK COMPANY, AN
ILLINOIS CORPORATION, AND LONDON GUARANTEE
AND ACCIDENT COMPANY, LTD.,

Petitioners,

vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER OF UNITED
STATES EMPLOYEES' COMPENSATION COMMISSION, TENTH
COMPENSATION DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SEVENTH CIRCUIT:



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TRANSCRIPT OF RECORD

IN THE

United States Circuit Court of Appeals For the Seventh Circuit

No. 6808

SOUTH CHICAGO COAL & DOCK COMPANY, AN
ILLINOIS CORPORATION, AND LONDON GUARANTEE
AND ACCIDENT COMPANY, LTD.,

Plaintiffs-Appellees,
vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER OF UNITED
STATES EMPLOYEES COMPENSATION COMMISSION, TENTH
COMPENSATION DISTRICT,

Defendant-Appellant.

Counsel for Plaintiffs-Appellees:
MR. ROBERT J. FOLONIE.

Counsel for Defendant-Appellant:
MR. WILLIAM J. CAMPBELL,

U. S. C. O. A. 7

FILED

DEC 28 1938

FREDERICK G. CAMPBELL
CLERK

Appeal from the District Court of the United States for the Northern District
of Illinois, Eastern Division.

TRANSCRIPT OF RECORD FILED NOV. 14, 1938.
PRINTED RECORD.

46

IN THE
**United States Circuit Court of Appeals
For the Seventh Circuit**

No. 6808

**SOUTH CHICAGO COAL & DOCK COMPANY, AN
ILLINOIS CORPORATION, AND LONDON GUARANTEE
AND ACCIDENT COMPANY, LTD.,**

Plaintiffs-Appellees,

vs.

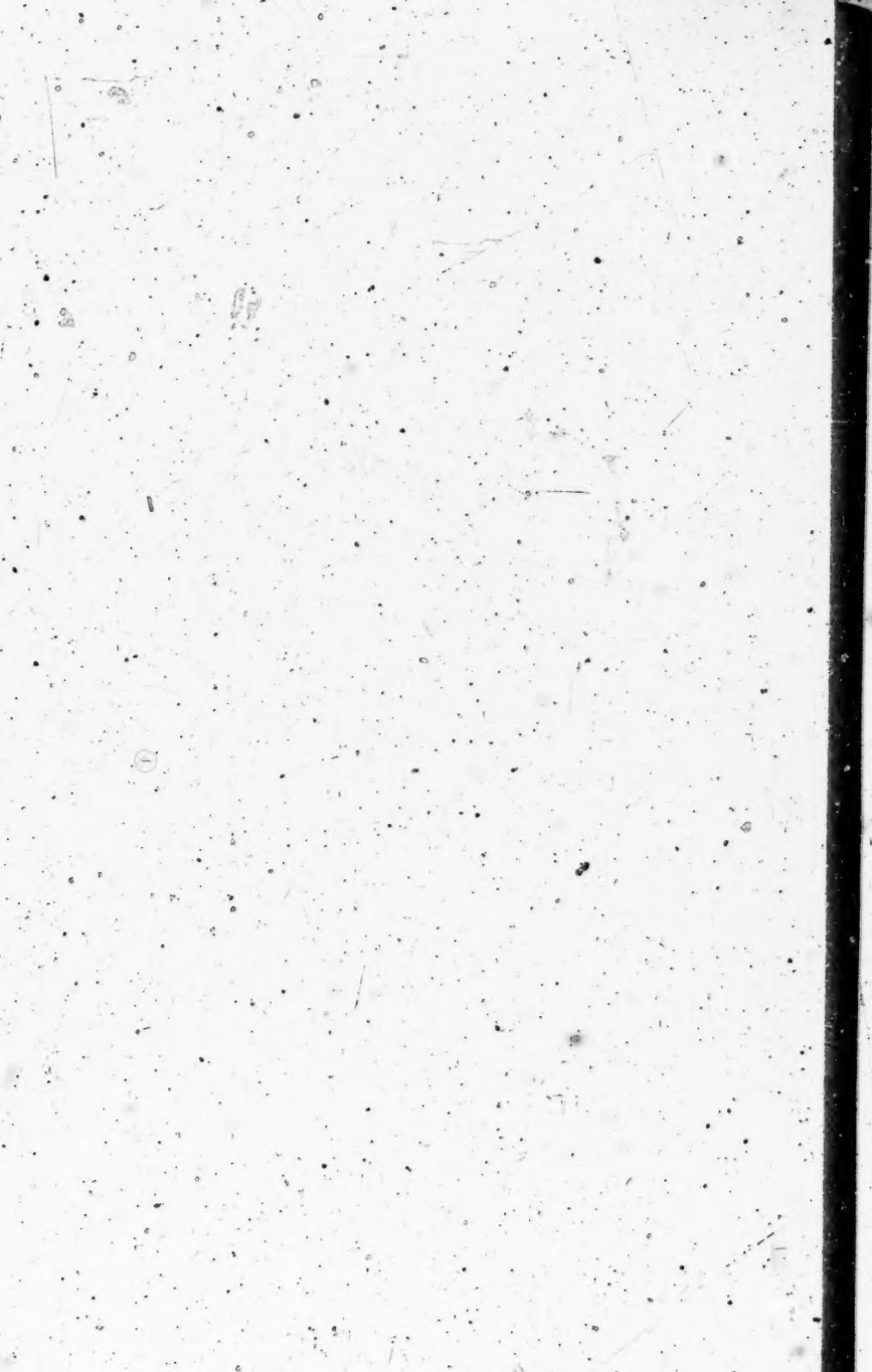
**HARRY W. BASSETT, DEPUTY COMMISSIONER OF UNITED
STATES EMPLOYEES COMPENSATION COMMISSION, TENTH
COMPENSATION DISTRICT,**

Defendant-Appellant.

Counsel for Plaintiffs-Appellees:
MR. ROBERT J. FOLONIE,

Counsel for Defendant-Appellant:
MR. WILLIAM J. CAMPBELL,

**Appeal from the District Court of the United States for the Northern District
of Illinois, Eastern Division.**



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1 Pleas in the District Court of the United States for Placita.
the Northern District of Illinois, Eastern Division, be-
gun and held at the United States Court Room, in the City
of Chicago, in said District and Division, before the Honorable
Philip L. Sullivan, District Judge of the United States
for the Northern District of Illinois on the eighth day of
July, in the year of our Lord one thousand nine hundred
and thirty-eight, being one of the days of the regular July
Term of said Court, begun Monday, the fourth day of July,
and of our Independence the one hundred sixty-third year.

Present:

Honorable Philip L. Sullivan, District Judge.

William H. McDonnell, U. S. Marshal.

Henry W. Freeman, Clerk.

Filed 2
Mar. 3,
1938.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

South Chicago Coal & Dock Company,
an Illinois corporation, and London
Guarantee and Accident Company,
Ltd.,

vs.

Harry W. Bassett, Deputy Commis-
sioner of United States Employees'
Compensation Commission, Tenth
Compensation District.

No. 15968.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Bill of Complaint with exhibits attached thereto, in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Divi-
sion, on this the third day of March, 1938.

3 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—15968) • •

BILL FOR INJUNCTION.

First: The South Chicago Coal & Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd., a corporation of the Kingdom of Great Britain, and licensed and doing business in the State of Illinois, both of said plaintiffs doing business in, and residing in, Chicago, Illinois, complain of defendant, Harry W. Bassett, who is Deputy Commissioner of the United States Employees' Compensation Commission, Tenth Compensation District, a citizen of Illinois, and residing at Chicago, in said State.

Second: The jurisdiction of this court depends upon the power of this court through injunction, provided by the Longshoremen's and Harbor Workers' Compensation Act (44 Statutes 1424, United States Code Annotated, Title 33—1937 Cumulative Annual Pocket Part, Chapter 18, Section 921), and the ground of the court's jurisdiction under such statute rest in the fact that a compensation order was made

4 by the said Deputy Commissioner, purporting to act under said Act, and ought to be suspended and set aside, because John Schumann came to his death in course of employment of first named plaintiff, which death occurred in Calumet River in the County of Cook and State of Illinois, and his death is not within the coverage of said Act, but was the death of a member of the crew of a vessel; and because the finding that his death occurred while she was moored is without support of any evidence before said Deputy Commissioner; and the finding that he and plaintiffs were persons comprehended within the terms of said Act, and not excepted therefrom, is without the support of any evidence, and contrary thereto.

Third: The plaintiff, South Chicago Coal & Dock Company was the employer of John Schumann, and operated a steam vessel propelled by its own steam power. The said vessel is called the "Koal Kraft", which vessel was of a tonnage of approximately 312 net tons, and about 159 feet in length, and 37 feet broad, and 10 feet draft. Said plaintiff was engaged in fueling vessels through medium of said vessel.

The other plaintiff, London Guarantee and Accident Company, Ltd., was the insurance carrier, insuring liability of said other defendant which might be imposed upon it under Longshoremen's and Harbor Workers' Compensation Act upon any of its employees.

John Schumann came to his death on October 31, 1937, by drowning in Calumet River in this judicial district, while employed on said vessel as a deckhand and one of the crew of said vessel, consisting of five persons, of whom he was one, constituting the crew operating said vessel in Calumet

5 River and Calumet Harbor and Indiana Harbor, and confining its operations within the navigable waters of the United States in the state of Indiana and Illinois. Said South Chicago Coal & Dock Company is hereinafter called "employer" and said London Guarantee and Accident Company, Ltd. is hereinafter called "insurance company".

Employer received notice of the death of John Schumann, which occurred on October 31, 1937 by drowning, this drowning occurring by his being lost from said vessel while navigating the Calumet River. A claim for compensation was filed with United States Employees' Compensation Commission in the office of Deputy Commissioner, Harry W. Bassett, a copy of which claim for compensation is hereto attached and marked "Exhibit A."

Answer was filed by plaintiffs, wherein it was alleged:

Bill for Injunction.

"It is denied that both the employer and employe was subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury." After filing of said answer, hearing was had and evidence produced, and true, full and correct transcript of which is hereto attached and marked "Exhibit B", and made a part hereof by reference.

Findings of fact and award were entered by the said Deputy Commissioner on February 21st 1938, copy of which is hereto attached and marked "Exhibit C", and made a part hereof by reference.

John Schumann was a deckhand and a member of the crew of said vessel, performing customary duties of a deckhand, with particular duties in caring for making lines 6 fast, loosing same, keeping vessel clean and performing other duties incident to fueling vessels. By the laws and regulations of the Government of the United States, employer was required to have a crew, of which said deceased was one, and regulations were imposed by regulations of Vessel Inspectors, requiring a crew not less than 5 persons to man such vessel. There was no evidence before Deputy Commissioner, and it is not a fact, that John Schumann was a labore~~r~~ but, in truth and in fact, he was a member of the crew of said vessel and a deckhand and a seaman.

The death of John Schumann occurred while the vessel was navigating the waters of the United States, namely, Calumet Harbor and River, and not while she was moored, and there was no evidence before the Deputy Commissioner warranting the defendant in finding that she was moored at the time of his death.

Deceased was one of the crew of said vessel, employed in her navigation as a deckhand, and his services were necessary to her navigation.

Mary Schumann is insolvent and a person of no financial means, having no property of any kind and supported by her parents and not employed in any gainful work, and if the plaintiff should pay to her or for her the sums awarded to her, they could not be recovered back; and said Jeanette Schumann is an infant, having no financial means and insolvent, and if payments were made to said Mary Schumann for her, it could not be recovered back from either of them.

The other payments prescribed to the said Brown Funeral Home for funeral expense, and the said Samuel J. Spiegel, as attorney's fee, are amounts to be paid for 7 and on behalf of and for benefit of the said widow and child so previously named, and said amounts, if paid, could not be recovered back by the plaintiffs, and plaintiffs

would be irreparably injured and would lose entirely the amounts awarded for payment to said widow, child, funeral home and lawyer, as in the award of the Deputy Commissioner prescribed and directed. Plaintiffs attach here-to as "Exhibit D" the affidavit of William F. Shean to be presented on motion for interlocutory injunction.

Fifth: Plaintiffs pray that said compensation order, and each part of said order directing payments to divers persons, may be set aside, and that findings may be set aside that John Schumann was a laborer, and finding that death occurred while said vessel was moored, and finding that John Schumann and the plaintiffs were persons comprehended within the terms of said Act; that, being contrary to and not supported by the evidence, upon final decree the compensation order may be set aside and the same, and its enforcement, be permanently enjoined and restrained; that, in addition, said compensation order may be suspended and that an order be entered for an interlocutory injunction suspending the same during the pendency of this suit; that payments required by said award, and each of them, be stayed pending final decision; and that this court may find and adjudge that the said employment of John Schumann was as the member of a crew of the vessel "Koal Kraft"; that said claim is not within the compensation provisions of Longshoremen's and Harbor Workers' Compensation Act; and that plaintiffs should not be, nor is either of them, subject to, or liable to, pay compensation because of the death of John Schumann; and that the 8 said claim for death is not within the jurisdiction or power of the defendant to administer or apply as against either plaintiff.

South Chicago Coal & Dock Company,
London Guarantee and Accident Com-
pany, Ltd.,

By Robert J. Folonie,

Their Solicitor.

Robert J. Folonie,
Solicitor for Plaintiffs.

Address:

105 West Adams Street,
Chicago, Illinois.

State of Illinois, } ss.
County of Cook. }

John E. Wilson, being duly sworn, upon his oath says: I am agent for the plaintiffs in this behalf and have had charge of the matters therein recited on behalf of plaintiffs and familiar with the facts. I have read the above and foregoing Bill of Complaint, and the same and the matters and things therein contained are true in substance and in fact.

John E. Wilson.

Subscribed and sworn to before me this 3rd day of March, A. D. 1938.

(Seal)

Lillian Preiss,
Notary Public.

9

EXHIBIT A.

(Stamp) Received Nov. 10, 1937 District No. 10.

United States Employees' Compensation Commission
Office of Deputy Commissioner Harry W. Bassett
Administering Longshoremen's and Harbor Workers'
Compensation Act

Leave This Space Blank

Case No. 468-1

Insurance

Carrier's No. 25

Claim For Compensation In Death Case By Widow and/or
Children Under The Age Of Eighteen

- 1 I hereby make claim for compensation arising out of the death of John Schumann who died on Oct. 31, 1937
- 2 at Chicago, Illinois, as a result of injury sustained on
- 3 Oct. 31st, 1937, at 97th St. & Calumet River on Koal
(Place where injury happened and name of vessel)
- 4 Kraft Barge in the employ of South Chicago Coal &
(Name of employer)
- 5 Dock Company whose address is 160 N. La Salle St., Chi-
(Street and Number)
- 6 cago, Ill. Cook Deceased left the following children who
(City or town) (County)
were under 18 years of age at the time of his death:

Exhibit A.

7

Received Nov 10 1937 District No 10

Names	Date of Birth
Jeanette Schumann	August 7, 1936

These questions should be answered where the widow is claiming compensation

8 Widow was born on April 28, 1909 at Chicago, Illinois
(Date) (Place)

9 Widow was married to the deceased on 14th day of
10 July, 1934 at Chicago by City Hall
(Place where married)

(Name or title of person performing ceremony)

11 Last physician or hospital _____
(Name and address)

12 Name of undertaker Brown Funeral Home Address 95th
& Commercial, Chicago

13 Amount of undertaker's bill, \$462.50 Amount paid, if
any, \$ none

14 By whom paid _____
(Name) (Address)

Dated this 9th day of November, 1937

(Signed) Mary Schumann
(Signature of claimant)

Address 10023 Avenue N, Chicago, Ill.

Affidavit

State of Illinois, } ss.
County of Cook. }

On this 9th day of November, 1937 personally appeared before me the above-named Mary Schumann and made oath that the answers by her above named and subscribed, are true.

(Signed) Marion Fahse,
(Seal) Notary Public.
Address 127 N. Dearborn St., Chicago, Ill.

10

EXHIBIT B.

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11. United States Employees' Compensation Commission.

Before Harry W. Bassett, Deputy Commissioner

Tenth Compensation District, Chicago, Illinois.

Case No. 468-1.

John Schumann, Deceased,
*Claimant,**vs.*South Chicago Coal & Dock Com-
pany,
*Employer,*London Guaranty & Accident Com-
pany,
*Insurance Carrier.**Transcript of
Testimony at
Hearing.*

Pursuant to notice, this matter was hearing before Harry W. Bassett, Deputy Commissioner, United States Employees' Compensation Commission, at Chicago, Illinois, on the 27th day of January, 1938.

Appearances:

Samuel J. Spiegel, Esq., For the Claimant.

John E. Wilson, Esq., and T. F. Clinton, Esq., For the Insurance Carrier.

12. Deputy Commissioner Bassett: Now, for the record, it is John Schumann, deceased, isn't it?

Mr. Wilson: Yes.

Deputy Commissioner Bassett: And the South Chicago Coal & Dock Company is the employer and the London Guaranty & Accident Company is the carrier.

Mr. Wilson: Yes, sir.

Deputy Commissioner Bassett: And the claimant lived at 10023 Avenue N, Chicago?

Mr. Spiegel: That is correct.

Deputy Commissioner Bassett: And the name of the barge was the Koalkraft?

Mr. Wilson: That is right.

Deputy Commissioner Bassett: And the deceased met his death on or about October 21, 1937?

Mr. Wilson: That is correct.

Deputy Commissioner Bassett: Mr. Wilson, in your U. S. 215, in answer to question 1 you deny that the applicant sustained an injury on or about the date set forth in the application?

Mr. Wilson: Well, the reason we did that was because there was no definite information as to how he met his death. I have no way now of telling.

Deputy Commissioner Bassett: Do you want to answer it any differently now?

Mr. Wilson: Well, I do not see how I can change 13 my position, Mr. Commissioner, because I have no way of determining it.

Deputy Commissioner Bassett: In answer to question 2, you still hold that the employer and the employe were not subject to the Longshoremen's and Harbor Workers' Compensation Act?

Mr. Wilson: Yes.

Deputy Commissioner Bassett: And in answer to the third question you admit that the relationship of employer and employe existed at the time of the injury or death?

Mr. Wilson: By that I mean he was working then on this boat.

Deputy Commissioner Bassett: Yes. And in answer to the fourth question, you deny that at the time of the alleged injury, the employe was performing services growing out of and incidental to his employment.

Mr. Wilson: Well, the situation there is the same as it is in regard to question No. 1. I do not know what he was doing. He was on that boat and that is all I know.

Deputy Commissioner Bassett: Well, of course, if he was on the boat he would be in his employment. He would be there. Under our Act you would not have to show any negligence, and so forth. I merely want your answers in the record.

Mr. Wilson: Well, the thing I am principally interested in here is whether or not he came within the Act.

Deputy Commissioner Bassett: Well, that is what we want to bring out if we can.

Mr. Wilson: Yes, and I do not want to make any admissions that will put me in the position where I admit that.

Deputy Commissioner Bassett: Well, I do not think that would put you in that position. It is just merely a

question. I do not think it would put you in that position, under the law.

Mr. Wilson: Yes. That is the reason for my denial, that I do not want to admit it.

Deputy Commissioner Bassett: You still withhold an answer on regard to that.

Mr. Wilson: I think I had better do so.

Deputy Commissioner Bassett: In answer to question 6 you admit, of course, that the applicant was killed?

Mr. Wilson: Yes.

Deputy Commissioner Bassett: And the next question, No. 7, there is no answer there.

Mr. Wilson: There was no temporary disability.

Deputy Commissioner Bassett: No. And in answer to question 8—that is in regard to wages.

Mr. Wilson: There was none set forth.

Deputy Commissioner Bassett: Well, you were paying him something, weren't you? What were his wages?

15 Mr. Wilson: I can get that for you.

Deputy Commissioner Bassett: Well, be sure and get it before you leave.

Mr. Wilson: Oh, we have the records with us. We will find that out for you.

Deputy Commissioner Bassett: Yes. I want it in the record, that's all.

Mr. Wilson: Yes. We will find out for you. I think he was paid by the hour, but I am not certain.

Deputy Commissioner Bassett: I think we may as well go ahead now.

Mr. Spiegel: Before we proceed, I wish to enter a written authority by Mrs. Schumann to represent her as required by the Longshoremen's and Harbor Worker's Compensation Act. It is in writing.

Deputy Commissioner Bassett: All right. It may be filed with the record as Exhibit 1.

(Said document was marked Exhibit 1, and is attached hereto)

Mr. Wilson: Well, I haven't done that, but my appearance is in.

Deputy Commissioner Bassett: That is all right.

Mr. Sachs: Now, I also want to submit to the Commissioner that under Section 20, we come here with the following presumptions and I want to avail myself of them:

16 The first presumption, that the claim comes within the provisions of this Act and therefore, as a result

of this provision, the burden will be upon them to proceed with the evidence and overcome this presumption.

Mr. Wilson: I do not think that is the rule of law, is it, Mr. Commissioner?

Deputy Commissioner Bassett: I do not see as it makes any difference myself. After I hear all the evidence I will decide as to whether I think the case comes under it in any way and then you have the right to appeal, and all that.

Mr. Wilson: There is no such thing, then, as a directed verdict in these hearings, is there?

Deputy Commissioner Bassett: No. I will decide as to that part, whether the case comes under the Act or not.

Mr. Wilson: Well, the point I mean is, do these witnesses that are produced, is the presumption so strong that I must produce witnesses to overcome it? That is what I mean.

Deputy Commissioner Bassett: No. As I say, what he has said about that would not make any difference to me at all. All I want is the evidence here to find out in my own mind whether he was a member of the crew or not.

Mr. Wilson: Well, that is exactly what I am getting at. Now, does he produce witnesses to prove that or must I produce them?

Deputy Commissioner Bassett: I think the evidence 17 either way would be all right. That is all I want.

Mr. Spiegel: Mr. Commissioner, I am making this statement at this time, not because of anything, but because of the interest in the widow here, I am here to take advantage in every way that I can for her. This Act, as I have read it, and I have read it carefully, is primarily for the protection of the claimant in this particular case. There are many special privileges given under this Act to the claimant that are in no other place in legal proceedings. There are so many starting points in favor of the claimant given by this Act that the Congress, in its wisdom, deemed necessary to give, her that it would be a lack of duty on my part if I did not impress on the Commission she should be given advantages that are provided for her. It is true the final award is made by the Commission on the question but there are points that are in her favor and I would very much want these privileges taken into account and consideration given to them.

Now, this presumption about a claim coming within this provision of the Act, why did the Act provide for it? It is for the purpose of putting them on notice and they have to produce witnesses to overcome it. As a matter of fact,

I have nothing to do here. I have to come in rebuttal. They have to show why my man, who was working on their boat, does not come under this Act? The Act itself, 18 the fact of the filing of the claim under this provision, puts them to work. They have to overcome it. So, Mr. Wilson is right in his understanding of it that they have to overcome a legal presumption that the claim comes within the provision of this Act. You know, Mr. Commissioner, that is given almost a French aspect of the law. It is not the plaintiff who comes into the Court who has the burden of proof here; it is the opposite. The defendant has the burden of proof. They have to prove to you that Mr. Schumann is not entitled to all the privileges and payments under this Act.

Deputy Commissioner Bassett: You mean they have to? That is what they are going to try to do, they are going to try to claim he does not come under this Act.

Mr. Wilson: That is right.

Mr. Spiegel: I am presenting only one point. They have to overcome the legal presumption.

Now, we have another legal presumption. We have the presumption of notice. We have the presumption that the injury was not occasioned by drink, by intoxication of the injured person.

Now, Mr. Commissioner, you know this Act excludes certain claims. There is an exception in this Act that if the man died because of some wilful act of somebody else, then he does not come under the Act, but there is a presumption that he did not. So that while I am here presenting 19 the first point, I maintain that there are other protections right along I want to claim that each and every protection in favor of my client should be taken into account.

Now, at this stage of the game we come to the first presumption, namely, that the claim comes under the Act. I have nothing to do here. Let them overcome it. Is that not correct, Mr. Commissioner?

Deputy Commissioner Bassett: I am only here to hear the evidence and I hope you will both present all the evidence you can for me to decide the case on. I am here only to carry out the Act. And if he comes under the Act, I will be glad. I will say that to both of you.

Mr. Clinton: We are here to give you every aid we can in determining the point, your Honor. We are not here to withhold anything that you want.

Mr. Wilson: No. The only think I want to know is the method of procedure.

Deputy Commissioner Bassett: You may be as free as you want to be with your evidence. In fact, the more evidence on the subject, the better I like it, because I would like to have all of the evidence.

Mr. Wilson: Well, the only thing I was trying to find out is where the burden of proof is. But, we will proceed and when we get to that point, to the point where I think I should find out, I will step in and inquire.

20 Mr. Spiegel: When they have introduced their evidence, if I find I should need some evidence and I haven't got enough here, I will ask the Commissioner to bear with me so that I can produce evidence to overcome any evidence they offer.

Deputy Commissioner Bassett: We can continue the case until the time you can get such evidence as you think is proper.

ARTHUR J. SPOTTON, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. Wilson.) What is your name?

A. Arthur J. Spotton.

Q. What is your address, Captain?

A. 6311 Greenwood.

Q. What is your profession, business or occupation?

A. Boat Captain.

Q. On or about October 31, 1937, by whom were you employed?

A. South Chicago Coal & Dock Company.

Q. And you were employed by them as what?

A. Captain of the freighter Koalkraft.

Q. And you spell that K-o a-l-k-r-a-f-t?

A. Yes, sir.

Q. Where was this Koalkraft boat, or whatever you call it, used, Captain?

A. It was used as a fuel lighter for fueling steam-boats and other marine equipment.

21 Q. Where is the regular course of the operation? That is, where does it operate?

A. It is licensed to operate in the Calumet River and Harbor and operate in the Indiana Harbor and River.

Q. How long have you been in this line of work, Captain?

A. In this line of work twelve years.

Q. Altogether?

A. No, in the marine business I have been in it since 1900.

Q. How much of this time have you spent in and around Chicago and Calumet City and in the immediate vicinity of the Lakes and Calumet River and other streams here?

A. Fourteen years.

Q. How long have you had this particular job with this particular boat, Captain?

A. Twelve years.

Q. Now, from your past experience, Captain, are you well enough acquainted with the system of streams and waters around the City of Chicago to tell us whether or not the Calumet River and Lake are considered to be navigable streams?

A. Yes, sir.

Q. Are they?

A. Yes, sir.

Q. Now, under whose jurisdiction are they, as far as you know, as far as your experience touches?

A. Federal.

22 Q. Federal jurisdiction. Now, Captain, can you give us the size of this boat, this Koalkraft boat?

A. I don't remember it just offhand. My ship's license will give the dimensions (producing a document). 159 feet in length, 37 feet 6 inches breadth, 10 feet 4 inches draft, 376.20 gross tons, 312 net tons.

Q. How is this vessel propelled, Captain?

A. By steam.

Q. Now, in order to operate this vessel, do you have to perform any functions or do you have to report or are you subject to any department for an inspection or issuance of a certificate or anything of that kind?

A. We are inspected once a year by the Federal Government, steamboat inspectors.

Q. This was under the United States Government?

A. Yes, sir.

Q. Now, did you have a certificate permitting you to operate this vessel on the date of this supposed occurrence?

A. Yes, sir.

Q. Do you have that certificate with you?

A. No, this is the ship's license.

Q. That is the license?

A. Yes, sir. This expires the 1st of July, 1938.

Mr. Wilson: Would you like to see that license, Mr. Commissioner?

23 Deputy Commissioner Bassett: No, I do not think it is necessary.

Mr. Wilson: Are you satisfied this boat is a duly licensed boat, or do you require more proof on that?

Deputy Commissioner Bassett: No, there is no question in my mind it is the boat.

Mr. Wilson: Are you satisfied the place where they are operating is navigable water? A navigable stream?

Deputy Commissioner Bassett: Yes.

Mr. Wilson: And that it comes under the Federal jurisdiction?

Deputy Commissioner Bassett: I think so.

Q. (By Mr. Wilson): Now, Captain, the work on this vessel was what?

A. Well, the work on this boat is to deliver coal to steamboats and other marine equipment.

Q. And these steamboat and other marine equipment were used on all of the Great Lakes and different parts of the Great Lakes?

A. Yes.

Q. Captain, how many men did you have on that boat with you?

A. Five men.

Q. What was the designation of those men as far as you were concerned?

24 A. I have one engineer, fireman and three deck hands.

Q. Now, can you give us the names of the deck hands that were working for you say from the 15th of October up to the date of this occurrence?

A. George Jornick, Joe Kete, and John Schumann.

Q. And John Schumann that you refer to is the deceased?

A. Yes, sir.

Q. Now, what was your engineer's name, Captain?

A. Harry Zivney.

Q. And your fireman's name?

A. Ray Kersten.

Q. They constituted the crew on that date, on the day of this alleged occurrence; on October 31st?

A. Yes.

Mr. Spiegel: Of course, I object to the form of the question. That is an issue here, whether it was a crew or not.

Deputy Commissioner Bassett: That is all right. We can decide that afterwards.

Q. (By Deputy Commissioner Bassett) There was one engineer and one what?

A. One fireman and three deckhands.

Q. You say two deck hands.

A. Three deck hands.

Q. And among the deckhands you claim the deceased was one?

25 A. Yes, sir.

Q. (By Mr. Wilson) Those, with yourself, constituted the crew of this vessel?

A. Yes, sir.

Q. Were you men divided into teams or partners, or anything of that kind, Captain?

A. Why, in the handling of the mooring of the boat there were two men forward and two aft. The aft men, one of them was a fireman.

Q. You designated them as partners?

A. Well, they call them all partners.

Q. Well, who worked with your fireman on the after end?

A. At that time, John Schumann.

Q. That was on the date of this occurrence?

A. Yes.

Q. Captain, can you tell me what Schumann's duties were while he was working on this boat?

A. Why, he was a deck hand and he done general deck work. He handled lines, got on the dock and took the stern line and made it fast and on leaving the dock he threw the stern line off the dock.

Q. Did he assist the fireman at any time?

A. Why, yes, they were all willing to take an interest in learning to fire so in case the fireman got sick we could have a man to replace him.

26 Q. And one of these three deck hands that you mentioned would replace the fireman if he was sick or off or quit or anything of that kind?

A. Yes.

Q. Who hired John Schumann?

A. I did, sir.

Q. Who hired the rest of the members of this crew?

A. I did.

Q. Under what status was he paid? I mean by that, was he paid as a seaman or sailor or deck hand?

A. He was paid as a deck hand, as a member of the crew of the boat Koalkraft.

Q. And that was the only pay he ever received while working for you?

A. Yes, sir.

Q. He took orders solely from you, is that right, Captain?

A. Yes, sir.

Mr. Wilson: I think that is all the questions I have.

Deputy Commissioner Bassett: I would like to ask a few questions.

Q. (By Deputy Commissioner Bassett) You say he worked with the fireman on the day he was injured?

A. Yes, sir. That is, he handled the line. The fireman ran the winch that operates the line and he passed the line off the deck, or put it on the dock, whatever 27 the occasion would be.

Q. But, you said you worked with him so that he would become familiar with firing so that he could take the job of fireman?

A. Yes, sir, they generally do that.

Q. You brought that in at some time. You say he was working with the winch now.

A. Yes, sir.

Q. How much an hour did you pay this man?

A. Sixty cents.

Q. That extra help that goes on those boats are fifty cents an hour men. You paid him sixty cents an hour, did you?

A. Yes, sir.

Q. There were no quarters on that boat for anyone to stay on there, were there?

A. No, sir.

Q. And his sole pay was sixty cents an hour, and how many hours a day?

A. Well, that varied all the way from eight to twelve hours. We are not allowed to work any more than twelve hours out of any twenty-four hours, that is continuously.

Q. Explain more in detail just what this boat was used for. You say it fueled other vessels or ships?

A. Yes.

Q. I do not understand that. Tell me.

28 A. Well, it is a lighter that is built with a hopper so that coal will run down. There is a belt conveyor on the bottom of these hoppers that the coal out of the hoppers runs on to and it is carried to an elevator. The elevator runs up and there is a chute and it is swung over to a boat and gravity brings it down.

Mr. Wilson: Mr. Commissioner, would you like to have that picture introduced in evidence? (Indicating) I thought it might be used here and I have brought it along.

Q. (By Deputy Commissioner Bassett) In employing this kind of help they sign no papers, do they?

A. No, sir.

Q. Of course, crews of other ships sailing the Great Lakes they all sign articles, don't they?

A. Yes, sir. No local boat signs any articles. Anybody that is operating in the harbor or rivers don't sign any articles. As a rule, the boats that operate between different ports on different lakes sign articles.

Q. In this picture there you are up against a pile of coal.

A. Well, we are laying at the dock.

Q. Is that where you go to take on coal and then you go down the stream and meet another boat, is that it?

A. This is what they call the Stevens and Adams loading machine. The boom swings out from the dock 29 and the coal is loaded on there.

Q. How long did this deceased work for you?

A. From the 5th of October to the morning of the 31st.

Q. Twenty-six days?

A. Yes.

Mr. Wilson: I will offer that picture in evidence if you want it in, Mr. Commissioner.

Deputy Commissioner Bassett: Well, you suit yourself about that. I just wanted to get information here.

Mr. Wilson: Yes, sir. I would like to ask the witness one more question.

Q. (By Mr. Wilson) Did you hire any other men in or about the work on that boat, other than those men you have mentioned here, or that same number in a crew?

A. No, sir, I did not. You mean on some other boat?

Q. No, I mean on this same boat.

A. No, sir.

Q. They did all the work in connection with this one boat?

A. Yes, sir.

Q. (By Deputy Commissioner Bassett) You say his duties were those of a deck hand?

A. Yes.

Q. What are the duties of a deck hand on a boat of this sort?

A. Well, just general labor, keeping it clean, handling the lines, painting or whatever you ask him to do.

Q. Do you have any other work on this boat besides coaling or fueling?

A. No, sir.

Q. You do not carry anything else?

A. No.

Q. You say there are five men employed on one of these boats?

A. Six, including myself.

Q. Yes.

A. Six is the crew.

Q. Outside of yourself, how long are these men usually employed? Do you have to change that kind of help often?

A. No, we don't. The men we have stay pretty steady with us. I have a man who has been with me five or six years down there. I had one man who was a fireman down there eleven years with me.

Q. Do you employ extra help?

A. No, sir.

Q. You never have to take on extra help outside of the six of you?

A. No, sir.

Q. Do they have to have any experience when they come on there, any kind of experience as seamen or sailors or whatever you call them?

31 A. No, sir.

Q. They come on like laborers?

A. Yes. They pick up the work as they work along there.

Q. Do the deck hands work up to be firemen or work up to be the captain, or something of that kind?

A. Yes, sir.

Q. Does the South Chicago Coal and Dock Company have other boats besides the Koalkraft?

A. No, sir.

Q. That is the only one that they own?

A. Yes, sir.

Deputy Commissioner Bassett: I think that is all I have.

Cross-Examination.

Q. (By Mr. Spiegel) Among the four men that were employed besides Mr. Schumann, what is the longest period of time that any of them was employed, of the four men that worked at that time?

Mr. Wilson: You mean of the five men?

Mr. Spiegel: Yes, of the five men besides Schumann.

A. The Engineer.

Exhibit B.

Q. (By Mr. Spiegel) How long was the engineer working for you? What was his name?

A. Harry Zivney.

Q. How long was he working for you?

A. Oh, I don't remember. It was around seven or eight years, I guess.

32 Q. Continuous?

A. Continuous, yes.

Q. Was Zivney the fireman?

A. No, he was the engineer.

Q. How long did the fireman work there?

A. He has worked for me off and on for five years.

Q. Immediately preceding this accident, how long was he employed by you?

A. Since the 1st of April.

Q. Since the 1st of April?

A. Yes, sir.

Q. What was his pay, how much was he paid?

A. He was paid 65 cents an hour.

Q. And the deck hand was paid 60 cents an hour?

A. Yes, sir.

Q. As a matter of fact, you know that Schumann did not do any work as a fireman, don't you?

A. Why, no, he was not paid to work as a fireman, no, sir.

Q. No. Now, as a matter of fact, Schumann was called in only by telephone to come whenever there was work?

A. Yes, sir.

Q. Otherwise he was staying home waiting for a call to come to work?

A. Yes, sir.

Q. He was a plain laborer?

33 A. Yes, sir. In other words, he was called a deck hand.

Q. Now, he did not participate in any of the navigation of the boat, did he?

A. No, sir.

Q. Isn't it a fact that the man's main work consisted of coaling up the steamboat, when the boat came up it was his duty to coal up the steamboat?

A. No, while discharging the coal his duty was to keep the coal running in these hoppers up on deck with a pole.

Q. If there was no work he didn't have any claim on you, if there was no work he would not come and ask for work. Isn't that correct?

A. Why, no.

Q. He would only come when you called him?

A. Why, yes. Well, generally he knew when he went home at night whether to wait for a call or come out the next day.

Q. There was no obligation on your part to give him work?

A. No, sir.

Q. Will you state at least one act that Schumann did which requires any knowledge of seamanship?

A. Why, throwing a heaving line I think would be an act of seamanship. There are quite a few men that has to learn that.

Q. Did you teach him that?

A. The crew taught him. I didn't.

Q. That was the only act of seamanship that he 34 did, you would say?

A. Yes.

Q. As a matter of fact while a deck hand is in transportation, employed from the dry dock to the place where they have to attend to the other boat, there is nothing for them to do?

A. No, sir.

Mr. Spiegel: That is all.

Redirect Examination.

Q. (By Mr. Wilson) Captain, did this man do any other work there except on the boat?

A. No, sir.

Q. Did you call him every time you called the rest of the crew to handle this job of work while he was in your employ?

A. Yes, sir.

Q. Who did he replace, do you know?

Mr. Spiegel: How can he answer that?

Mr. Wilson: Well, the Commissioner asked him if he hired people from time to time. Now, did he replace his brother? That is what I want to know.

Q. (By Mr. Wilson) Wasn't it his brother he replaced?

A. No, sir.

Q. Do you know how long that man was with you whose place he took, or do you remember who that was?

A. Yes. That fellow's name was Jerkovitch. He was a former fireman. We had a fireman by the name of 35 Robinson for about eleven years and this man Jerkovitch went in there and when Jerkovitch quit, Kersten took his place, and then this man Schumann took Kersten's place.

Q. How long had Kersten been working for you?

A. Well, for the last five years.

Q. This boat just operates during the summer?

A. About eight months of the year. It generally comes out the forepart of March or the first of April. The first of April last year, I guess, we got started.

Q. (By Deputy Commissioner Bassett) Captain, you say this man had no duties except when the ship was moored?

A. Yes, sir.

Q. He had no duties while you were on the move?

A. No, sir.

Q. (By Mr. Wilson) Well, when he got to the end of the trip, if he was out to coal this vessel, what did he do out there? Did he attach the lines or anything of that kind to the boat you were coaling?

A. Nothing more than throw a heaving line up to one of the deck hands on the other boat.

Q. And that was his duty on the after end?

A. Yes.

Q. If there was any cleanup work, did he do that out there or at the end of the trip?

A. It was always done at the dock.

36 Q. Well, after he left the dock, who brought in those lines?

A. Well, if the boat was on the right side of the dock, he just threw it up but if the boat happened to be on the other side of the dock the only duty he had was to transfer the line from one side of the boat to the other.

Mr. Wilson: That is all.

Q. (By Deputy Commissioner Bassett) Captain, you said when you were moored and unloading the deceased's duties were to keep the coal going?

A. Yes, sir. The boat has got hoppers here (indicating on the photograph) and sometimes the coal quits running and then they use a long pole to keep the coal free so it will run.

Deputy Commissioner Bassett: That is all.

Recross Examination.

Q. (By Mr. Spiegel) Isn't it a fact that if he gave any assistance to the fireman it would be incidental to his main duty?

A. Yes, sir.

Q. (By Deputy Commissioner Bassett) Have you on you what you paid this man for twenty-six days? That is the only time he worked, from the 5th to the 31st, you said?

A. Yes.

A. That would be twenty-six days. Of course, there would be Sundays out and so forth and so on. I merely wanted to know about how much time you paid him.

37 Mr. Wilson: I have the record right here, Mr. Commissioner.

Q. (By Deputy Commissioner Bassett) Were you paid every day?

A. No, sir, we were paid twice a month. We were paid on the 5th and 20th. The 5th and 20th were paydays.

Mr. Wilson: I have the time sheet taken from the payroll. It is dated 10-15-37. His number apparently was 7374. It starts on the 5th day of the month, October, and runs down to and including the 15th, every day. At the bottom of the sheet it says, "John Schumann, occupation, deck hand. Koalkraft." If you want the hours I will give them to you day by day.

Deputy Commissioner Bassett: No, I just want to know how much he got.

Mr. Wilson: There was a total of 117 hours, apparently, and the amount of money paid was \$70.20.

Then there is another payroll time sheet here entitled the same as the other, running from the 16th day of October to the 30th day of October, both inclusive. This sheet is dated 10-31-37, and shows 152 hours, or a total of \$91.20, and this sheet shows that he worked every day and the duration of the work was never less than eight or more than twelve hours.

Q. (By Deputy Commissioner Bassett) Did he work on Sundays too?

38 A. Yes, sir.

Mr. Wilson: And the hourly rate shown on the sheet is 60 cents per hour. It is right here in figures. He is designated as a deck hand on the Koalkraft.

Q. (By Mr. Spiegel) As a matter of fact, Captain, you called him on two occasions to do some work.

A. Yes, sir.

Q. And the last occasion was a call at night to do some work?

A. Three o'clock in the morning.

Deputy Commissioner Bassett: He worked an average of ten hours a day.

Mr. Wilson: Yes. The time sheet shows 12, 8, and then three 12s, then a 10, then a 12, 8, 10, 8, 12, 10, 8, 8 and 8.

Deputy Commissioner Bassett: I just add 152 hours; 15 days and ten times fifteen is 150.

Mr. Wilson: Well, this is what appears on the time sheet

and these are the official records of the company and I have a man here to identify them if you want that done.

Deputy Commissioner Bassett: No, I think that is immaterial. I think that is all I have.

Mr. Spiegel: That is all.

Q. (By Mr. Wilson) You do not know anything about this accident, do you?

39 A. No, sir.

Mr. Spiegel: Well, you are not going into how the accident happened now, are you? I am not interested in that at all.

Mr. Wilson: All right, that is all for the Captain.

Deputy Commissioner Bassett: He was on the boat when last seen, and all that.

Mr. Spiegel: Yes.

(Witness excused.)

Deputy Commissioner Bassett: I think we have established a rate there. You have shown for the time he worked about \$161.

Mr. Wilson: Yes.

Deputy Commissioner Bassett: We have not agreed on a rate here. Of course, the Chicago rate as agreed for help where they cannot show the amount, is \$11.85. There is an agreement here in Chicago that the rate is \$11.85 per week.

Mr. Wilson: Is that for deck hands, sailors and so forth, or is that for longshoremen?

Deputy Commissioner Bassett: Oh, we are using it for men around here. Unless the widow can show that he made more than \$11.85 a week—

Mr. Wilson: Well, that is the actual payroll that I gave you.

Deputy Commissioner Bassett: Yes. If the case is 40 under the Act and is allowed, our paying her would depend on how much a week we would have to have. However, it would not make any difference to the Insurance Company. They would just as leave pay it the other way if they have to pay it.

Do you have some more witnesses as to what you think his duties were, and so forth, and things of that kind?

Mr. Spiegel: Yes.

Deputy Commissioner Bassett: Well, of course, we want to hear that.

Mr. Spiegel: Let them finish first.

Mr. Wilson: Well, I have put on enough to overcome your presumption, in my opinion. If you have got anything to put on to the contrary, all right.

Mr. Spiegel: Are you through?

Mr. Wilson: I have put on the Captain and if you have anything to put on, I will rebutt it.

Deputy Commissioner Bassett: I would like to hear all there is to know on the subject, what his duties were and what he was doing. I do not care who tells it but I would like to know it because I have to decide it finally.

Mr. Spiegel: I will put the widow on, and, Mr. Commissioner, I will have you ask the questions.

Deputy Commissioner Bassett: I do not want to ask any offhand. I would rather ask a few questions after some facts have been developed.

41 MARY SCHUMANN, was sworn and testified as follows:

Digest Examination.

Q. (By Mr. Spiegel.) State your name.

A. Mary Schumann.

Q. Where do you live?

A. 10850 Avenue J.

Q. You are the widow of John Schumann, deceased?

A. Yes.

Q. And you are the mother of John Schumann's child and yours, Jeanette?

A. Yes.

Q. How old is Jeanette?

A. She is seventeen months old.

Q. Now, how old was John before he died?

A. He was thirty-two.

Q. What was John doing before he started to work for the Koalkraft?

A. He was working at the flour mill on Indianapolis Boulevard before he got this job.

Q. What was he doing there?

A. He was a miller.

Q. How much was he making a week when working as a miller?

A. Well, his pay was \$25 a week.

Q. He started to work for the South Chicago Coal

42 and Dock Company about what time?

A. Well, he went over there to find out if they needed his help and they told him no, so a woman came and told me there was a telephone call for Johnny. So I told him, I says, "You had better go and answer it." It was the coal dock. He went to work and he worked a

couple of hours and he was home at two o'clock that afternoon.

Q. What date was that? October 6th, was it?

A. I don't know exactly.

Q. Deputy Commissioner Bassett: Well, they said he went to work on the 5th.

The Witness: Yes, the 5th.

Q. (By Mr. Spiegel.) When he came back after he worked a few hours at the dock, what did he tell you?

A. Well, he told me he liked the job and he liked the fellows.

Q. What kind of work was he doing?

A. He was doing labor work. He liked the job real well, he said, and he said they told him to go back out and call the next morning.

Q. Did he tell you he was hired for the job and hired when you went there?

A. Yes, he said he was hired for the job. It was on and off.

Q. It was an on and off job, is that right?

43 A. Yes.

Q. Did you have a telephone?

A. No, I couldn't afford a phone, and so I asked a neighbor to call up for a week.

Q. And then you put in a telephone?

A. Yes, because the neighbors were tired and said they didn't want to wake up at 1:30 in the morning.

Q. And when the calls came in, he went out?

A. Yes, that is when he went out.

Q. Did he tell you in his lifetime what his duties in the deck were, on the boat?

A. Well, he said that one Saturday they went out he washed the Captain's deck and when he got through with that he could come home. So when he got home he said he might get called that evening, but he didn't, and so the Captain called that morning and said he should come at eight o'clock.

Q. Did he tell you what he did at that time?

A. He told me he ran up the hopper and freed the coal.

Q. What did he tell you his main duties were on the boat?

A. Well, he told me he was supposed to learn certain kinds of knots so when they threw the rope in the water they could tie it.

Q. What were his main duties that he told you?

A. Main duties?

Q. About the coal. Do you understand my question? What was he doing on the boat?

44 A. Well, he was just a laborer and did whatever they told him he had to do.

Q. What was the barge doing? What were they doing there? It was a coal barge, wasn't it?

A. Yes.

Q. What was he doing there?

A. Well, to take this here line.

Q. And pull up the other one?

A. Yes, he was supposed to let one fellow down there know—I really don't know what kind of job he had because he didn't say much. He went to sleep and was tired.

Q. Now, he was sleeping at home?

A. Yes, he was sleeping that night and the baby was playing with him (the witness weeps), and he said, I have to quit at 1:30 and go to work." The baby was even sick that night.

Q. Now calm yourself.

A. He says, "Don't worry, I will come back." And he never did. (Witness further weeps.) He really thought of me and the baby a whole lot.

Q. Now, Mrs. Schumann, was John ever employed on any steamboat at any time before?

A. No, this was the first time.

Mr. Wilson: Wait a minute. I object to that. That is immaterial. She can't prove that.

45 Mr. Spiegel: If she knows.

Q. No, he worked at other places, but this was the first time he got a job on that boat.

Q. (By Deputy Commissioner Bassett.) Did he work on other boats?

A. No, he didn't. That was the first boat he got a job on. He was a man that took any kind of work just to support his mother and children and baby and wife.

Q. (By Mr. Spiegel.) But, that was his first boat job?

A. That was his first job on a boat.

Q. He was paid for that. How was he paid? By the week or by the hour?

A. On the boat job?

Q. Yes.

Q. Well, he got paid every two weeks.

Deputy Commissioner Bassett: I think that is established. They establish that he got 60 cents an hour. It shows he was paid twice a month. They testified that he got \$70.20 at one time and \$91.20 another time.

Q. (By Deputy Commissioner Bassett.) You knew that to be a fact, did you?

A. Yes.

Deputy Commissioner Bassett: Well, that is sufficient.

Q. (By Mr. Spiegel.) Did he at any time tell you he did fireman's work?

46 A. No, only he said he helped the fireman once in a while.

Q. When was that once in a while he told you?

A. Well, he was supposed to fire up that Sunday when he went.

Q. What was the reason?

A. The fireman said that he saw him last. He never quarreled with anybody. He never was with no drunk or anything.

Mr. Spiegel: That is all.

Cross-Examination.

Q. (By Mr. Wilson.) He told you that his work was to be on the boat, did he?

A. Yes, always on the boat. He never had much to say about it.

Q. He told you that he took the lines off when the boat started and then hooked them up again when the boat came back to the dock? Did he tell you that?

A. (No response.)

Q. Mrs. Schumann?

A. Yes.

Mr. Spiegel: What is that? Did you hear the question?

Q. (By Mr. Wilson.) Did you hear the question I asked you?

A. Yes.

Mr. Spiegel: I didn't hear the question.

(The question was read.)

The Witness: Yes.

47 Q. (By Mr. Wilson.) Did he tell you that he did whatever the Captain told him to do on the boat?

A. Yes, whatever was his duty.

Q. And all his duties were on that boat.

A. Right on that boat.

Q. Did he tell you he was hired as a deck hand for the boat?

A. Well, he said that is what the rest of the crew called him, but he called himself a laborer.

Q. But the rest of the crew called themselves deck hands?

A. Yes.

Q. And they called him a deck hand?

A. Yes.

Q. And you knew on the night of this occurrence when he went out that he was going out to work on the boat, did you?

A. Yes.

Q. He was supposed to leave at 1:30.

A. Yes, they called up at 1:30 and he was supposed to appear for work at two o'clock that morning.

Q. I see. That is all.

Mr. Spiegel: That is all.

Q. (By Deputy Commissioner Bassett.) How long did he work for the flour mill? Do you say that was on Indianapolis Avenue out there?

A. Yes. Oh, I don't know. He was working there quite a long time. The place went bankrupt and they 48 moved out of the town, and he did not want to leave his mother and he thought heck, as long as he was living out there he would get a job out there and so he got that job.

Q. How many years did he work at the flour mill?

A. Oh, I don't know; his brother would know.

Q. Well, would you know? Was it two years or three years or five years?

A. Oh, I think it was about five years.

Q. Five years?

A. Yes.

Q. And his pay was \$25.00 a week?

A. Yes.

Deputy Commissioner Bassett: That is all.

(Witness excused.)

Mr. Wilson: I will offer that picture in evidence as an exhibit, if the Commissioner please.

Mr. Spiegel: There is no objection.

Deputy Commissioner Bassett: All right.

(Said photograph was marked EXHIBIT 2, and is attached hereto.)

STANLEY SCHUMANN, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. Spiegel.) Will you give us your full name?

A. Stanley Schumann.

49 Q. Where do you live, Mr. Schumann?

A. 10449 Avenue H.

Q. What is your business or occupation?

A. My occupation is handyman at the Wisconsin Steel Company.

Q. Stanley, were you a brother of John Schumann?

A. I was.

Q. Were you ever employed by the same company for which your brother worked, namely, by the South Chicago Coal and Dock Company?

A. I was.

Q. As what?

A. As a laborer in the yard.

Q. Coal yards?

A. Coal yards; yes.

Q. Are you familiar with coal barge operations?

A. Yes, sir.

Q. Do you know of your own knowledge the kind of work your brother did while employed by the coal barge?

A. Well,—

Q. Do you know?

A. Yes, I do know.

Q. Now, did you speak to him about his work in his lifetime?

Mr. Wilson: Wait a minute. I am going to object to that. That is not admissible.

50 Mr. Spiegel: I submit to the Commissioner there is absolutely no restriction of any kind on the line of evidence in this hearing. The statute definitely says that even hearsay is admissible here. It is for the Commission to decide how much credit to give to it.

Mr. Wilson: Well, Section 23 says, "Declaration of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made—"

Mr. Spiegel: Will you tell us from what you are reading?

Mr. Wilson: Section 23 of the Act.

Mr. Spiegel: Of what?

Mr. Wilson: The Act.

Mr. Spiegel: Under (a) or (b)!

Mr. Wilson: (a) "Declarations of a deceased employe concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence be sufficient to establish the injury."

Now, it gives you no right to introduce any other statements of the deceased.

Mr. Spiegel: I am glad you called my attention to it because it does support my contention. Hearsay statements are admissible here because there will be other evidence and the Commission will decide what weight to give to it. The Commissioner hearing the evidence here may decide 51 that the testimony of the Captain corroborates the statements here.

Mr. Wilson: Oh, well, go ahead. We will save time.

Deputy Commissioner Bassett: Yes, it does not make any difference.

Q. (By Mr. Spiegel.) All right. Tell us what you know from your conversation with John Schumann and from your own knowledge what the duties of John Schumann were while working on the coal barge.

A. Well, he was working for the coal company. I know that he was in doubt of tying a certain knot and he asked me how to go about it and I gave him my best opinion about it. He also, that I know of, fueled that barge up at the dock because they haven't a leg to fuel that barge up. That is the belt conveying the coal from the coal dock on the barge (indicating on the photograph).

Q. So he helped load up the barge?

A. Absolutely; yes. And from there whenever we fueled any boat along the river it was his duty to push down the coal from the coal pockets on to the conveyor that conveyed the coal on to the boat for that fueling.

Q. Outside of that was there anything that he did, any other labor?

A. Well, outside of what the labor amounted to at the dock, to put the coal on the barge, and then from the barge to the boat, that they were fueling.

Q. That is all it was?

52 A. Yes.

Q. (By Deputy Commissioner Bassett.) Where was he when he would do that work? On the boat or on the dock?

A. On the dock.

Q. Out on the dock and not on the boat?

A. On the dock.

Deputy Commissioner Bassett: Has the Captain gone?

Mr. Wilson: No, the Captain is here.

Q. (By Mr. Spiegel.) That was on a particular Saturday he told you he did that? Is that what you said?

A. No, this particular job that the Commissioner is asking me about is on this night.

Q. No, I am talking about the fueling up of the barge.

A. The fueling of the barge is an every day occurrence over there. If the barge is empty, they come in to fuel it and if they are busy loading up the boat, they use that leg to fuel that barge.

Q. And you know that John did that work?

A. He did that work; yes.

Q. And you know John was staying home and receiving his calls whenever needed, is that right?

A. That is right.

Q. And you know he was getting his pay only by the hours he actually put in when he was working?

A. That's right.

53 Mr. Spiegel: That is all.

Cross-Examination.

Q. (By Mr. Wilson.) You know he was hired as a member of the crew on this Koalkraft, do you not?

A. Yes, sir.

Q. And all the work that he did had to do with the work on the Koalkraft?

A. Yes.

Q. And he worked on the after end of the Koalkraft, didn't he?

A. Yes.

Q. Throwing off lines and taking them up?

A. Yes.

Q. He never worked anywhere except in connection with the Koalkraft?

A. He always worked in connection with the Koalkraft, even when in the yard.

Q. And his immediate superior was the Captain of that Koalkraft?

A. Yes.

Q. He did not take any orders from anybody else?

A. No.

Q. Except the members of that boat?

A. That is right.

Q. Were you ever present when he was working?

54 A. While at work?

Q. Yes.

A. No, I was not.

Q. You never saw him do any work?

A. No.

Q. Anything you know is what he told you?

A. Yes, what he told me.

Mr. Wilson: That is all.

Redirect Examination.

Q. (By Mr. Spiegel.) You have seen people working from the coal docks into the barge?

A. Yes.

Q. Sometimes members of the crew do that work?

A. Yes, sure.

Mr. Spiegel: That is all.

Q. (By Deputy Commissioner Bassett.) Did you ever work on the Koalkraft?

A. No, I haven't.

Q. Have you been on any of those boats at all?

A. I have been on the boat, to clean up the bottom of them, that is, cleaning up the bottom of the boat when they have come in with a load of coal and so on. I have hired out as a laborer to clean up the bottom and pick up the remains of the coal off the bottom of the boat. They call that clean-up work.

55 Q. You say all the work that your brother done was in connection with the unloading of coal. Did you make that statement? All his work was in connection with the unloading of the coal. Did you mean to convey he was not a part of the movement of the boat?

A. He was a part of the movement of the boat, yes.

Q. He was. In what way?

A. Well, with the lines.

Q. (By Mr. Wilson.) He also did some of the firing, too, as a relief fireman, didn't he?

A. Well, that I couldn't tell you; whether he has done that or not. I know he did have something to do with the lines. He asked me about tying a certain knot. That is what he wanted to see me about.

Q. (By Mr. Spiegel.) Isn't it a fact that that was incidental to his main duty, namely, the fueling of the big steamboats?

Mr. Wilson: Well, that would be a conclusion on this man's part.

Deputy Commissioner Bassett: That would be up to the Commissioner to decide that from the evidence given.

The Witness: He was just like any other good man that would help one another out in a pinch, that's all I would suggest.

Q. (By Mr. Spiegel.) As one laborer to another?

56 A. Yes, that is all I could think of. But, his duties were not as a fireman because he was not hired as a fireman.

Mr. Clinton: Well, that is within the province of the Commissioner.

Mr. Wilson: He was hired as a deck hand. That is how he was hired.

The Witness: Well, how he was hired, I don't know.

Q. (By Mr. Spiegel.) Did your brother know about working on boats before the accident? Had he ever worked on boats before?

A. He himself?

Q. Yes.

A. No, not that I know of.

Mr. Spiegel: That is all.

(Witness excused.)

Deputy Commissioner Bassett: Do you have any more witnesses, Mr. Spiegel?

Mr. Spiegel: Not at this time, no.

Mr. Wilson: I have the fireman here. I will have him come in.

Deputy Commissioner Bassett: All right, we will hear the fireman.

RAYMOND KERSTEN, was sworn and testified as follows:

Direct Examination.

Q. (By Mr. Wilson.) What is your name?

57 A. Raymond Kersten.

Q. What is your address?

A. 6223 Dorchester.

Q. On October 31, 1937, what was your occupation?

A. Fireman on Koalkraft.

Q. For whom?

A. On the Koalkraft.

Q. Yes, but by what company were you employed?

A. South Chicago Coal and Dock Company.

Q. Did you know who the members of the crew were on that date?

A. Yes.

Q. Can you give us their names or tell us how many there were?

A. There were six of us altogether; three deck hands, engineer, captain and fireman.

Q. Did you know John Schumann?

A. Yes, sir.

Q. What part of the crew was he?

A. He was on the after deck, a deck hand on the after deck.

Q. What were his duties? Can you tell us?

A. Well, his duties, his main duty was to poke down the coal from the hopper on to the belt when it stuck there. He also put the line on the boat for me. I ran the after winch. As soon as I took the cable off the winch, he 58 stood there and gave me signals. When the boat was tied up he went up and pushed coal down.

Q. What were the signals?

A. Well, the Captain gives the signal with his hand like that (illustrating) and that means to take it up. Well, he passes that signal on to me, Schumann does, because I can't see where I am, I can't see the Captain where I am. I am in the middle and here is the winch and the Captain stands up on the deck on top and John stood on the end and received the signals from the Captain and passed them on to me.

Q. Well, he stood on the deck of the boat and passed the signals from the Captain on to you for the movement of the line that you tied up to the boat with?

A. Yes.

Q. And that had to do with setting the boat against the dock where you were refueling?

A. Spotting the boat, they call it.

Q. Yes. Now, did he do any work other than that occasionally?

A. Well, he went down below and helped scrub the deck down there.

Q. Yes.

A. Any painting that was necessary to be done on the boat was a part of his job. The deck hand maintained the outside of the boat and inside. I maintained the engine 59 room and the fire hole.

Q. Well, now, when he moved this coal in the hopper, was he on or off the boat?

A. He was on this second deck here (indicating on the photograph marked Exhibit 2). He stands along there on the edges with a long pole in his hand and the coal fits in the corner. It is a three-cornered pocket. He pushes the coal out of the corner to clean the pocket out completely.

Q. Now, were there any other men besides the six of you handling the boat when you were refueling it?

A. No.

Q. How long have you been on that boat?

A. Six years.

Q. Have you always been a fireman on this boat?

A. No, I was a fireman for two months.

Q. Then you were a fireman on that day?

A. Well, I was deck hand before I was fireman.

Q. Did you ever have the same job Schumann had?

A. I had the same job for two years.

Q. I see. Now, that boat only operates a portion of the year, doesn't it?

A. It is a seasonal job, eight months.

Q. And during that time you are called whenever you are needed?

A. Whenever I am needed, twenty-four hours duty.

60 Q. But, you only work twelve hours out of every twenty-four?

A. Yes.

Q. Now, every time that boat goes out on a refueling job, all six members of the crew have to go with it, is that right?

A. Yes, sir.

Q. And as long as a man continues to be a part of that crew they don't employ anyone else to do any of the work?

A. No, unless a man is sick at home. Then another man is used to take his place.

Q. You have to have six men to do that work?

A. The law says six men on the boat.

Q. The law says six men on the boat as members of the crew, is that it?

A. Yes, sir.

Q. Do you fellows do any other work around that place outside of loading and unloading this boat?

A. We load our boat.

Q. Well, I mean your work is entirely confined to the Koalkraft?

A. My work is entirely confined to the Koalkraft.

Q. Meaning the deck hands who work there like Schumann?

A. Well, they run this rig on the dock.

Q. But, that is only for the Koalkraft?

A. Yes. Not for trucks or anything else.

Q. Did you do that on the night of this accident?

61 A. Yes. We loaded the boat that night before we went home.

Q. And when you came back it was already to go?

A. It was already to sail.

Q. Now, on the night of this occurrence, the last time you saw Schumann, where was he?

A. He was in the fire hole with me.

Q. Where was the boat at that time?

A. About 20 feet from the dock.

Q. In motion?

A. Approximately. I can't say definitely. Yes, the boat was in motion to go ahead.

Q. Before that, he had thrown the lines off?

A. He was through with that, he had thrown the lines off and jumped on the boat.

Q. And then you had been at the winch and winding the line up?

A. Yes.

Q. And after the boat cut loose from the dock you went into the engine room?

A. Into the fire hole immediately.

Q. And he followed you in?

A. Yes.

Q. And you were in motion at the time he was in the fire hole?

A. Yes.

62 Q. What was going on at that time? Was the boat moving up the river?

A. It was going out about half speed, I guess, checked speed, waiting for the bridge to open.

Q. But, you were out on the river entirely free from the dock?

A. Yes.

Q. You had no lines attached to anything else?

A. No.

Cross-Examination.

Q. (By Mr. Spiegel) Now, the deck hands, Mr. Kersten, maintained, you say, the inside and outside of the boat?

A. Yes.

Q. That is your expression?

A. Yes.

Q. That is, you mean they maintained its appearance?

A. Well, painting and scrubbing.

Q. It has nothing to do with the navigation of the boat, has it?

A. Nothing to do with the steering or anything of that kind, if that is what you mean.

Q. The fireman and the engineer, they have to do with the steering of the boat?

A. No, the Captain steers the boat.

Q. You say the deck hands have nothing to do with
63 the steering or with the navigation of the boat?

A. No, they don't.

Q. And while the boat is in motion the deck hands
really have nothing to do?

A. Well, I would say the deck hand has nothing to do except when there is an emergency breakdown, if there is any repair work.

Q. And if Schumann done any firing for you it was as an accommodation to you or because he wanted to do it himself?

A. Yes. It was mostly an accommodation. We shared with each other a good deal. We got along very nicely.

Q. He was a good boy. Now, Mr. Kersten, you say this boat was refueled, is that right?

A. Yes, we refueled our own boat.

Q. The day before?

A. The evening before.

Q. And that means the people worked on the dock?

A. No, we refueled our own boat.

Q. From the dry dock, is that right?

A. Yes.

Q. And Schumann did a part of that work, too?

A. He was what we call the pocket man on the boat. These are all pockets (indicating on the photograph marked Exhibit 2). They pile coal on top of them and he spots that stuff and regulates it.

64 Q. Well, anybody could have worked on the dry dock and helped to refuel the boat and convey the coal into your barge, is that right?

A. Yes, the other two deck hands do that, too. There is two men on the dock.

Q. You said before that the main duty of John Schumann was to refuel this steamboat when your coal barge would come up to it? That was his main duty?

A. Yes.

Mr. Spiegel: That is all.

Redirect Examination.

Q. (By Mr. Wilson) You said Schumann worked on the boat all the time the refueling was being done?

A. Yes.

Q. He did not work on the top at all?

A. No. He worked at the forward winch.

Q. He had charge of the forward winch?

A. Yes.

Q. He never at any time worked on the dock while refueling your boat that you know of?

A. Not as I know of.

Q. The other two deck hands did that?

A. Yes, they were more accustomed to do it as they were broken in on the job.

Q. (By Mr. Spiegel) If he was more accustomed he would have done it, too?

65 A. Yes.

Q. Now, while he was working there he never slept there in the boat?

A. No.

Q. He stayed at home and was called whenever there was work?

A. Yes.

Q. That applied to all of you?

A. Yes.

Q. (By Mr. Wilson.) If there was a breakdown Schumann might have to help with the fixing of it, to help fix it up, is that right?

A. He would have to help. That is a part of his duty.

Q. Now, Schumann took all of his orders from the Captain, didn't he?

A. From the Captain.

Q. And the Captain hired everybody in that crew?

A. Well, the engineer hired his own fireman. That is a separate department.

Q. None of the crew did anything except what they had to do, that is the law?

A. That is right. That is all they had to do.

Mr. Wilson: That is all.

Q. (By Mr. Spiegel.) And when you refueled your own boat you done work on the dock?

A. Well, that is on the dock. The machine is there.

Mr. Spiegel: That is all.

66 Q. (By Commissioner Bassett.) You said Schumann was down here (indicating on the photograph)?

A. Yes, he was down on the stern when he gave signals.

Q. You say his main duties were to keep that coal going on the belt?

A. Yes, he has a long pole and he pokes the coal down into the pockets.

Q. Well, there would not be any orders to be given if he was standing alongside of the loading place or unloading there, would there?

A. No.

Q. Well, where would he be, when he is seeing that the coal is going along?

A. He stands there (indicating) with the pole in his hands.

Q. Where is that?

A. Right here on this little deck. That is a narrow deck down here. Here is a deck down here and here is one down here (indicating).

Q. He is up here on this deck here?

A. Yes. He jumps on to the dock from that deck.

Q. You say he painted and scrubbed. They usually clean up when there isn't any work to be done, any other work, don't they?

A. No, they don't do a thing in the winter time. I said his duty was painting and scrubbing as a part of his 67 job. But, he was not there at the time that work would be done. He was not there until late in October. We do that work in the summer.

Q. Well, I was going to ask you this: You have to have another crew so that if one of you lays off some one will be able to take his place. I know that men sometime have to lay off.

A. Occasionally they have to.

Q. If they cannot find them, somebody to take their place, what do they do then?

A. Well, there is usually, you see, men on the dock that have been broken in and they know their duties and we get them. If we can get them.

Q. Well, you say his main duty was to keep the coal on the belt and see that the coal got off that boat?

A. Yes, sir, that was his main job.

Deputy Commissioner Bassett: I think that is all.

(Discussion off the record.)

(Witness excused.)

Mr. Wilson: Well, you are satisfied this is a boat and you are satisfied that this was navigable waters.

Deputy Commissioner Bassett: Oh, yes.

(Further discussion off the record.)

Mr. Wilson: Will you stipulate that the Captain under the marine laws is forced to have a crew of six to operate that vessel?

Mr. Spiegel: The record shows that, but I do not 68 want to stipulate it.

Mr. Wilson: Well, then, I will bring the Captain back and let him testify about it unless the Commissioner will take official judicial notice of it.

Deputy Commissioner Bassett: I know that has been said. I take it that that is true.

ARTHUR J. SPOTTON, was recalled for further examination and testified as follows:

Direct Examination.

Q. (By Mr. Wilson.) You are the same Captain who testified before?

A. Yes, sir.

Q. And you have a license as a Captain to operate a boat in these navigable waters?

A. Yes, sir.

Q. Captain, is there any requirement in the law, state, federal or otherwise, that requires you to have any particular number of men to operate this Koalkraft?

A. Yes, sir.

Q. What is that law and what does it require?

A. It requires six men.

Q. What law is that?

A. That is a Federal law which we get a notification of every time the boat is inspected. That goes on the inspection certificate.

69 Q. That law requires you to have a crew. Now, I want to know particularly if the law requires six men to operate that vessel?

A. Yes.

Cross-Examination.

Q. (By Mr. Spiegel.) Well, when you speak of the law, you did not read that statute, did you?

A. No.

Q. Then how do you know about it?

A. The inspectors give us a certificate of inspection and it says how many men are required.

Q. Have you got that with you?

A. No, it is posted in the pilot house of the boat.

Mr. Spiegel: That is all.

Q. (By Commissioner Bassett.) Captain, if somebody didn't show up, what would you do then?

A. I would have to get a man.

Q. Supposing you could not get a man?

A. Well, we would have to call up the Seaboard Inspectors and get permission. It all depends on where our destination is.

Q. (By Mr. Spiegel.) Where do you get your men?

A. Well, we pick them up on the dock, or wherever we can get them.

Q. You pick them up on the dock?

70 A. Yes.

Mr. Spiegel: That is all.

(Witness excused.)

(Whereupon the hearing adjourned.)

I hereby certify that the foregoing is a full, correct and true transcript of all testimony taken at the hearing herein mentioned.

(Signed) Floyd Worden.

71

EXHIBIT 1.

Samuel J. Spiegel

Attorney at Law

127 North Dearborn Street

Chicago

Telephone
Central 4472

January 21st, 1938

To: Mr. Samuel J. Spiegel

I am hereby giving you written authority to represent me before Deputy Commissioner at the hearings on my claim against the South Chicago Coal & Dock Company and at any other hearings pertaining to this claim.

Mrs. Mary Schuman. (Signed)

EXHIBIT C.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
Tenth Compensation District.

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Mary Schumann, widow; and Jeanette Schumann, minor child of John Schumann, deceased,
Claimant,

vs.

South Chicago Coal & Dock Company,
Employer,

London Guarantee & Accident Company, Ltd.,
Insurance Carrier.

COMPENSATION ORDER AWARD OF COMPENSATION CASE NO. 468-1.

Such investigation in respect to the above entitled claim having been made as is considered necessary, and A hearing having been duly held in conformity with law on January 27th, 1938,

The Deputy Commissioner makes the following:

Findings of Fact.

That on the 31st day of October, 1937, John Schumann was in the employ of the employer, South Chicago Coal & Dock Company at Chicago, in the State of Illinois in the Tenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the London Guarantee and Accident Company, Ltd.; That on said day the employee herein, while performing services for the employer, as a laborer on the barge "Koal Kraft" which vessel was moored on the navigable waters of the United States at 97th Street and the Calumet River, fell from the

barge into the river, and was drowned; That notice of injury was given to the employer; That the average annual earnings of the employee at the time of his death amounted to the sum of \$1170.00; That the deceased employee left dependents as follows: Mary Schumann, his widow, 73 born April 28th, 1909, and Jeanette Schumann, minor child, born August 7th, 1937; That the burial and funeral expenses of said deceased's employee's body amounted to the sum of \$462.50, the undertaker being the Brown Funeral Home, and that no part of said expense has been paid; That claimant's attorney Samuel J. Spiegel, 127 N. Dearborn Street, Chicago, Illinois, has performed services in this proceeding of the reasonable value of \$50.00 and is entitled to a lien against the compensation payable to the claimant for said amount.

Upon the foregoing facts the Deputy Commissioner makes the following

Award.

That the employer, South Chicago Coal & Dock Company, and the insurance carrier, London Guarantee & Accident Company, Ltd. shall pay to the claimants, compensation as follows:

To Mary Schumann, claimant and widow herein, at the rate of \$7.875 per week beginning November 1st, 1937; and to Mary Schumann as the natural guardian of Jeanette Schumann, minor child, at the rate of \$2.25 per week beginning November 1st, 1937; accrued compensation from November 1st, 1937 to February 6th, 1938, a period of fourteen weeks, at the rate of \$10.125 per week amounts to \$141.75, all of which is accrued and payable; less the sum of \$50.00 which shall be paid to claimant's attorney Samuel J. Spiegel.

Said employer and insurance carrier shall pay the sum of \$200.00 to the Brown Funeral Home, 95th and Commercial Avenues, Chicago, Illinois, toward the burial and funeral expenses.

74 From and after February 6th, 1938 said employer and insurance carrier shall pay to Mary Schumann, compensation at the rate of \$10.125 per week on behalf of herself and minor child until and unless the Deputy Commissioner shall otherwise direct.

Given under my hand at Chicago, Illinois, this 21st day of February, 1938.

Harry W. Bassett,
Harry W. Bassett,
Deputy Commissioner.

75

EXHIBIT D.

State of Illinois } ss.
County of Cook }

William F. Shean, being duly sworn, upon oath says:

I am employed as investigator by the London Guaranteed and Accident Company, Ltd., one of the plaintiffs in the above cause.

On March 1, 1938, I went to 10850 Avenue J, Chicago and interviewed Mary Schumann, widow of John Schumann, and in answer to my questions then presented to her she did state that she is now living with her parents and does not have sufficient means to maintain a home for herself, and that she is entirely dependent on her parents for her support, as is her infant daughter.

She further stated that she received about \$1000 insurance money on her husband's death, and that she spent it for funeral expenses and other matters, and that it is entirely gone and she has none of it left.

She further stated that she is not employed, has no money whatever, and that her infant child Jeanette is living with her and both of them are being supported by the parents of said Mary Schumann.

I asked her whether she had any money or source of income and she said she had neither.

William F. Shean.

Subscribed and sworn to before me this 3rd day of March,
A. D. 1938.

(Seal)

Lillian Preiss,
Notary Public.

76 And on, to wit, the 13th day of May, 1938, came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Answer, in words and figures following, to wit:

Filed
May 13,
1938.

77 IN THE DISTRICT COURT OF THE UNITED STATES.
• • (Caption—15968) • •

ANSWER.

Now comes the defendant, Harry W. Bassett, and in Answer to the Bill for Injunction filed herein states as follows:

1. The defendant denies that said John Schumann came to his death as a member of the crew of a vessel but states the fact to be that his death occurred in the course of employment as a laborer and therefore is within the coverage of the Longshoremen's and Harbor Workers' Compensation Act and that whether the death occurred while the vessel was moored or not is immaterial in that said vessel was admittedly in navigable waters at the time of the accident.

2. This defendant denies that said John Schumann came to his death as a member of the crew or as a seaman so as to except him from the Longshoremen's and Harbor Workers' Compensation Act, but on the contrary states that on the date of his death, to-wit: October 31st, 1937 the said John Schumann was drowned in the Calumet River in the State of Illinois while he was a laborer on the Barge "Koal Kraft".

78 3. This defendant admits that the London Guarantee and Accident Company, Ltd. insured the liability of the employer, South Chicago Coal & Dock Company.

4. This defendant admits that proper notice of the injury was given to the employer.

5. This defendant denies that the services of the deceased was that of one of the crew or that he was employed in any way in connection with the navigation of said vessel or that his services were necessary to the navigation of said vessel, but in fact the said John Schumann was a laborer who signed no Ship's Articles; no living quarters were provided for him on the vessel; he was called at his home whenever his services were needed; that while discharging the coal his duty was to keep the coal running in the hoppers up on deck with a pole; that he had no duties to perform while the vessel was on the move; and in general performed no services which would make him a seaman so as to except him from the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

6. Defendant denies that said claim is not within the compensation provisions of the Longshoremen's and Har-

bor Workers' Compensation Act, and denies that said claim for death is not within the jurisdiction or the power of the defendant to administer or apply against either plaintiff.

M. L. Igoe,
Attorney for Defendant.

106 And on, to wit, the 26th day of October, 1938, there was filed in the Clerk's Office of said Court a certain *Stenographic Report*, in words and figures following, to wit:

107 • • (Index) • •

108 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—15968) • •

Stenographic Report of the testimony taken at the hearing of the above entitled cause before the Honorable Phillip L. Sullivan, one of the Judges of said Court, on the 7th day of July, A. D. 1938.

Present:

Messrs. McKinney, Folonie & Grear, by Mr. R. J. Folonie, appeared for the plaintiffs;

Mr. David H. Neuman, appeared for the defendant.

109 And thereupon the plaintiffs, to maintain the issues on their part, introduced the following evidence, to wit:

ARTHUR J. SPOTTON, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Folonie.

Q. What is your name?

A. Arthur J. Spotton.

Q. What is your occupation?

A. Master, Steamship Koal Kraft.

Q. How do you spell Koal Kraft?

A. K-o-a-l K-r-a-f-t.

Q. What is the approximate size of the Koal Kraft?

A. The Koal Kraft is 159 feet long, and 36-37.6 in breadth and 10 foot draft.

Q. What business was she engaged in in 1937?

Filed
Oct. 26,
1938.

MICRO CARD

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A. She was in a fuel lightering business.

Q. What did she do?

A. Well she handled—supply was transferred, of fuel, from the dock to the boat there at the mooring.

Q. Did she carry coal generally to vessels engaged in commerce on the Great Lakes?

A. Yes, sir.

110 Q. Were you her master throughout that season of 1937?

A. Yes, sir.

Q. I show you a certificate of inspection issued by the steamship inspectors, is that the certificate of inspection on this ship?

A. Yes, sir.

Mr. Folonie: Will you mark that plaintiff's exhibit 1? (Document marked as requested.)

Mr. Folonie: I offer in evidence this certificate of inspection.

Mr. Neumann: Was this introduced in the original transcript?

Mr. Folonie: No.

Mr. Neumann: I will object to it.

Mr. Folonie: It was agreed before the deputy commissioner that it had a certificate of inspection but it was not produced.

The Court: It will be admitted.

Which said document, so offered and received in evidence, was marked PLAINTIFF'S EXHIBIT 1, and is in words and figures as follows, to wit:

111 Mr. Folonie: Now, captain, I note that the crew is prescribed on this certificate in different waters and in different work the vessel was doing. What waters was this vessel in on the day John Schumann came to his death?

A. Calumet River and harbor.

Q. What is that? I mean what location, where it was on that day, what state?

A. In the State of Illinois.

Q. Was she engaged exclusively in harbor navigation that day?

A. Yes, sir.

Q. What crew did she carry?

A. She carried three seamen, one fireman, captain and engineer.

Q. That was the master, yourself, an engineer, fireman and three seamen?

A. Right.

Q. And was John Schumann one of the seamen that you have mentioned?

A. Yes, sir.

Q. What did he do prior to the date of his death, what did he do in connection with this vessel, what was his business?

A. Why, they do have lines—he got out on the dock and received the line from the boat, and he got on the dock to let go of the lines on the aft end of the boat.

Q. Did he do anything in connection with the firing of the boilers of your vessel?

A. No, sir.

112 Q. Did he have any work to do on the dock with respect to the coal?

A. No, sir.

Q. Were his duties performed entirely on the vessel?

A. Yes, sir.

Q. How long had he been working on this vessel before the date of his death?

A. He went to work on the 5th day of October and was lost the morning of the 31st.

Q. Of the same month?

A. Of the same month, yes.

Q. What do you call a seaman that does work handling the lines such as you mentioned, what do you call him?

A. A deck hand.

Q. Did this vessel go on voyages or did it just work around the harbor?

A. It just worked around the harbor.

Q. Were there any accommodations on the vessel for the crew to sleep?

A. No, sir.

Q. They did their sleeping at home, did they?

A. Yes, sir.

Q. Were they served with their meals on the vessel?

A. No, sir.

Q. They had to make provision for their own food, did they?

A. Yes, sir.

Q. When he worked, did he work continuously, certain hours, or was he subject to call?

113 A. He was subject to call, yes.

Q. How did you call him, by telephone, when you wanted him?

A. By telephone, yes, sir.

Q. In holding himself subject to call, he would come when you wanted him?

A. Yes, sir.

Q. And the work he did was in connection with the activities of this boat in coaling other vessels, is that right?

A. Yes, sir.

Mr. Neumann: If Your Honor please, this is simply a review of the testimony before, of the testimony that is in this transcript.

The Court: It does not do any harm if it is. I can't tell yet because I haven't got the transcript. Go ahead.

Mr. Folonie: Q. Now on the day this man Schumann came to his death, where was the vessel bound for when she left the dock?

A. To fuel the steamer, J. S. Ashley, moored at 103rd Street. It had landed at the dock.

Q. Was that also in this Calumet River?

A. Yes, sir.

Q. And did your crew consist of the persons you have mentioned, that is master, engineer, fireman and three seamen?

A. Yes, sir.

114 Q. And he was one of them?

A. Yes, sir.

Q. When did you miss him?

A. The man was missed—I don't know anything about the man being missed until they arrived at the steamer Ashley at 103rd Street.

Q. When you arrived there you found he was not on board?

A. One of the men reported him missing.

Q. When did you next see John Schumann or his body?

A. It was five days later.

Q. Where did you see his body then?

A. The coast guard fished him out of the river at 95th Street.

Q. Fished out of the water, was he?

A. Yes, sir.

Q. Drowned and dead?

A. Yes, sir.

Q. Where did Schumann perform his duties on this vessel, fore or aft or both?

A. He performed his duties topping the line at the aft end of the boat, and while discharging coal on board the other boat, his duty was to keep the coal flowing in the hoppers. In other words, poking it down.

Q. Were the duties performed by John Schumann while he was on this vessel, those that are ordinarily performed by a deck hand as one of the crew of vessels?

A. Yes, sir.

Mr. Folonie: That is all.

115 *Cross-Examination by Mr. Neumann.*

Q. How long did you say Mr. Schumann was working on this Koal Kraft prior to his death?

A. He was employed on the 5th of October and he was lost on the morning of the 31st of October.

Q. He was hired by you, is that correct?

A. Yes, sir.

Q. Did you hire all the help on this boat?

A. Yes, sir.

Q. What are the requirements of the seamen, the experience required by captains of boats in hiring seamen?

A. Why, there is no experience required on this boat, just the time I guess that he puts in on the boat. He learns the things, and what the boys tell him on the boat, and what the captain, the master, tells him.

Q. Are they classified as seamen right away?

A. Yes, sir.

Q. What are the duties of the seaman on a vessel, a sea-going vessel?

A. There are ordinary and first class seamen. He would be an ordinary seaman.

Q. What are the duties of an ordinary seaman?

A. To do deck work.

116 Q. Will you elaborate on your statement of deck work?

A. Yes, sir.

Q. Tell the court just what you mean by deck work.

A. By deck work, a deck hand is a man that does ordinary work. He handles the line, does odd jobs, painting and cleaning up the boat, keeps the boat in shipshape.

Q. Does the sea-going vessel have laborers?

A. Yes, sir, they call them ordinary seamen.

Q. I mean do they have laborers also?

A. No, sir, the ordinary seaman does that kind of work.

Q. In sea-going vessels the seamen are quartered aboard the boat, is that correct?

A. Yes.

Q. They eat aboard the boat?

A. Yes, sir.

Q. And they are on the payroll all the time, is that correct?

A. Why, yes, sir.

Q. And Mr. Schumann was subject to call at a half hour's or an hour's notice, was that his status, or two hours or three hours?

A. He generally had more notice than that.

Q. How long had he been aboard the boat the day that he was found missing?

117 A. Why he was aboard the boat from two o'clock in the morning, I guess, two o'clock in the morning. He was ordered out at two o'clock anyway.

Q. Two o'clock in the morning?

A. Yes, sir.

Q. Had you left the dock or pier before he was noticed missing?

A. No, sir.

Q. You were still at the pier?

A. No, we had left it. We had left the pier.

Q. Did Mr. Schumann have anything to do with the navigation of this vessel?

A. No, sir.

Q. The navigation of the vessel was entirely in the hands of the engineer and the fireman, is that correct?

A. No, sir, the master.

Q. The master?

A. Yes, sir.

Q. What are the master's duties?

A. The master's duties were to steer that ship and handle it, and give the signals to handle it.

Q. And the work in connection with the propelling of the vessel is in whose hands?

A. In the engineer's and the fireman's hands.

Q. And you say that the words seaman and deck hand are synonymous?

A. Yes, sir.

Q. Meaning the same thing?

A. Yes, sir.

Q. Are all deck hands seamen?

A. Ordinary seamen, yes, sir.

118 Q. Did you classify him as an ordinary or as a seaman?

A. I classified him as a deck hand.

Q. And his duties as a deck hand were what, again?

A. Handling the lines, take the line from a boat, put it on a piling on the dock, and relieving the pile mooring when the boat was leaving the dock.

Q. Who did the cleaning up of the boat?

A. The deck hands.

Q. And who did the coaling of the other vessels?

A. That was operated by machinery. The deck hands would operate that machinery. That is to load the coal from the Koal Kraft aboard the other vessel.

Q. Was any other work done beside coaling or fueling vessels on this boat?

A. No, sir, not any more than the handling of it and the loading on the boat.

Q. Do you know whether Schumann ever worked on a boat prior to the time he was employed on the Koal Kraft?

A. I think not.

Q. Did he ever have any experience in navigation?

A. I think not, not that I know of.

Q. In other words, you simply hired Schumann to do the manual labor on the boat, is that correct, captain?

A. Right.

Q. You say there were three deck hands on board?

119 A. Yes, sir.

Q. Was there ever a time that you had less or more than three laborers on board the Koal Kraft?

A. Not that I know of. That is the crew that the boat called for.

Q. What was Schumann's pay?

A. Schumann got paid at the rate of sixty cents an hour.

Q. For the actual hours on board the boat?

A. Yes, sir.

Q. He was not paid for the time he was on land or awaiting call?

A. No, sir.

Q. He had to furnish his own meals?

A. Yes, sir.

Q. And would he work every day?

A. No, sir.

Q. How far was this boat away from the dock or pier that you were bound for?

Mr. Folonie: You mean the vessel that was coaled?

Mr. Neumann: To be coaled.

A. Well, the vessel was at 103rd Street. We left at 95th Street. About eight blocks, in the neighborhood of a mile.

Q. And the course you took was through and in a navigable stream, is that right?

A. Right.

Q. What is anything did Mr. Schumann do while the boat was in transit to the boat to be fueled?

120 A. There was nothing for him to do.

Q. His duties were over until they reached the boat in question?

A. Yes, sir.

The Court: Q. Did you have any employees on the boat who were not members of the crew?

A. No, sir.

Q. Irrespective of whether skilled or non-skilled?

A. No, sir.

Mr. Neuman: Q. Do you know what the rules and regulations of the Commerce Department are regarding a boat of this size?

A. Why, we are not allowed to operate more than twelve hours continuously for any twenty-four. That was the idea of this call duty, to avoid— Sometimes our work was in the morning. A boat came in in the morning; we had another one in the evening.

Q. What are the rules and regulations of the Department as to the number of employees aboard a boat of this size?

A. Why, we were supposed to have one master, one engineer, one fireman and three—a crew of six men operating.

Q. A crew of six men?

A. Yes, sir.

Q. Including the master and engineer?

121. A. Yes, sir.

Q. Does the crew include the master when they say six men?

A. Yes, sir.

Q. In other words, you could get along with five men if the rules and regulations of the Department were not such, is that correct?

A. Yes, sir.

Mr. Neuman: That is all.

The Court: Anything else?

Mr. Folonie: That is all.

(Witness excused.)

RAYMOND KERSTEN, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. Folonie.

Q. What is your name, please?

A. Raymond Kersten.

Q. Were you one of the crew on the Koal Kraft when John Schumann came to his death?

A. Yes, sir.

Q. What was your job on the vessel?

A. Fireman.

Q. Had you gotten to know John Schumann while he worked on that vessel?

A. Yes, sir.

Q. What was his job, what did he do?

122 A. He was employed as a deck hand to throw off the line, and throw the line to the steamboat we were going to re-fuel, and clean up generally.

Q. Did you see John Schumann on that vessel on the day or night that he came to his death when you left the pier or dock?

A. Yes, sir.

Q. When you got to the vessel you were to coal, was he still on board your vessel?

A. No, sir.

Q. Did you see him disappear?

A. No, sir.

Mr. Neuman: If the Court please, I think it is immaterial whether or not he was noticed or seen to have disappeared. There is no dispute about him being on the boat, the fact he was employed on that boat.

Mr. Folonie: It is purely to bring out, if the court please, that the disappearance occurred in the course of the trip, and after they left the dock, which is the whole purpose of it.

The Court: Go ahead.

Mr. Folonie: Q. Did you work with John Schumann all the time he was on this vessel?

A. Well, yes, sir, on the stern end.

Q. From the time he started until his death?

A. Yes, sir.

123 Q. Did he perform the ordinary duties of a deck hand during that time?

A. Yes, sir.

Q. What did that consist of, what did he do?

A. Well, he let go my line on the dock, and he took the line in, and he threw the line to the steamboat, threw our cable; and he kept the deck cleaned off from all coal scattered all over it.

Q. What did he have to do with taking on or putting off the coal?

A. He was the top man, they call it, that pushed the coal down the hopper, a certain amount of coal, he shoved it down.

Q. Where would he do that work?

A. On the top deck.

Q. Of the Koal Kraft?

A. Yes.

Q. Did he have any duties with respect to the coal when you were putting it on the vessels?

A. Yes, sir.

Q. What did he do, the same kind of work?

A. That is what I talked about, pushed the coal down and kept the deck cleaned there.

Mr. Folonie: That is all.

124

Cross-Examination by Mr. Neuman.

Q. Mr. Kersten, what was the main, the chief duty of John Schnmann on board this boat?

A. I believe he was top man, I believe they call him. He discharged coal to the other steamer.

Q. He was not hired to throw out lines and swab decks?

A. Yes, he would throw lines.

Q. That was not part of his employment?

A. Yes, sir, to keep the deck clean and throw off the lines.

Q. The boat itself is engaged in coaling a vessel, other vessels?

A. Yes.

Q. That is where the owners of the boat receive their compensation from the fueling and coaling of the vessel, is that correct?

A. Yes, sir.

Q. And his main duty was to be the top man, poke down the coal?

A. Also let go the line, which is very important.

Q. How much time is spent in transit from the port, or your port or dock and the vessel to be fueled, in most cases?

A. In most cases forty-five minutes.

Q. Forty-five minutes. How long are you usually 125 at the boat that is being fueled?

A. It depends on the amount of coal he wants, if he wants fifty tons or one hundred.

Q. How long would it take to unload fifty tons?

A. About twenty minutes.

Q. About twenty minutes?

A. Yes.

Q. How many trips did you make a day?

A. Well, it depends on the orders that come in.

Q. When there are no orders the men are relieved?

A. Go home.

Q. They go home?

A. Yes.

Q. Are you subject to call the same as John Schnmann?

A. Yes, sir.

Q. How long have you been employed on the boat?

A. About, almost nine years.

Q. You have a fireman's license?

A. There is no license required.

Q. There is no license required?

A. No, sir.

Q. Does the engineer require a license?

A. Yes, sir.

Q. When the Koal Kraft reaches the vessel to be fueled, what is the procedure from then on?

A. Well, we tie up alongside first.

Q. How long does that take?

A. About five minutes.

126 Q. Do you assist in tying up the boat?

A. We run the winch, they call it. It is a machine that heaves in the cable and ties it up to the steamboat.

Q. Does the engineer assist in tying up?

A. He stays by his engine.

Q. He does not have anything to do with the throwing of lines?

A. No, sir.

Q. Does the master assist in tying up the boat?

A. Not in tying the lines. He does in directions.

Q. Then what happens or what is the next step?

A. Of my particular job?

Q. No, of the boat itself.

A. We stay alongside there and we discharge the coal to them and then operate the machinery.

Q. Do the deck hands operate the machinery?

A. Yes, sir.

Q. What does that consist of, that duty?

A. Just opening the pocket, they call it. There is a door in the pocket. We open it and the coal flows out on the conveyor. They regulate the amount of coal that is dumped on the belt.

Q. How long had John Schumann been doing this work?

A. Since the 5th of October, to the 30th.

Q. How many trips had he made during this period, how many days had he actually worked?

A. I couldn't answer that either. I didn't keep tab of it.

Q. How many days did you work during that period?

A. I haven't got my book here. I couldn't very well tell you.

Q. Would you say two days, three days, five days?

A. I would say more than that.
Q. Twenty-five days?
A. Approximately twenty-five days.
Q. You were working every day then between the 5th and the 30th?
A. I couldn't say for sure.
Q. Are you still employed on the Koal Kraft?
A. Yes, sir.
Q. Will you repeat the duties of the top man again?
A. Well, letting go my line on the dock, and throwing a heaving line to the steamboat, tying up our boat and the other boat, and then poking the coal down.
Q. How would that coal be poked down?
A. We have a long wooden pole with a speared end, a steel end, a long wooden pole. If a certain amount of coal sticks in the corner of the hopper—it is supposed to go down—he pokes the coal down so it runs down on the belt.

128 Q. When would the cleaning up of this boat take place, Mr. Kersten?

A. After loading.
Q. After loading?
A. After reloading our vessel.
Q. After your vessel was reloaded?
A. Yes, sir. Then the coal would spill on the deck and he cleaned it up.
Q. Your Koal Kraft would be cleaned up?
A. Yes, sir.
Q. That would be when it was moored?
A. Moored at our docks.
Q. Moored at your dock?
A. Yes, sir.
Q. What did the other two deck hands do on board this boat?

A. They kept things cleaned up. Practically the same duty except they did not go on top.
Q. Their work then took place—the actual work done by the deck hands took place at the dock and at the boat to be fueled, is that correct?

A. That is right.
Q. And during the trip over they were idle?
A. Yes, sir.
Mr. Neuman: That is all.
Mr. Folonie: That is all.
(Witness excused.)

Mr. Folonie: I have the steamboat inspector on the way down here, if the Court please. Perhaps coun-

129 sel will admit it and we will not have to wait for him even. I expect to prove by the steamboat inspector, Mr. Peter G. Peterson, Inspector of Hulls, the steamboat inspector for this district, that the certificate of inspection of the Koal Kraft, plaintiff's exhibit 1, was issued under his directions; and that in the case of river boats, which the Koal Kraft would be classed under, their regulations and crew are prescribed for such vessels as recited in this certificate.

Mr. Neuman: No objection.

The Court: All right.

Mr. Folonie: All right, I will accept counsel's admission of my statement as an equivalent of the sworn proof.

Mr. Neumann. I would like to recall, if I may, and ask Captain Spotten another question.

Mr. Folonie: That is quite all right.

ARTHUR J. SPOTTON, recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified as follows:

Cross-Examination Resumed by Mr. Neuman.

Q. Captain Spotten, at the time that John Schumann was hired, were the other two deck hands or seamen hired?

A. Yes, sir.

130 Q. Were they employed at that time?

A. Yes, sir.

Q. How long had they been employed on the Koal Kraft?

A. Oh, they had been employed on the Koal Kraft for about a year.

Q. Did you hire them?

A. Yes, sir.

Q. Had they been experienced?

A. They had had a year's experience. They were not experienced when they came abroad.

Q. You would not call them firstclass seamen, would you?

A. No, sir.

Mr. Neuman: That is all.

(Witness excused.)

Mr. Folonie: Let me put in some exhibits, and I will close my case and we will be through with all the evidence, and then I don't assume you will have any.

Mr. Neuman: There has been nothing new outside of the record so far aside from that certificate.

Mr. Folonie: If the Court please, I have attached to the bill of complaint claim for compensation signed by Mary Schumann, and I have recited in my bill the answer filed although it is not set out verbatim, and I here produce as plaintiff's exhibit 2 a certified copy of our answer and attached to the bill is also the findings of fact and 131 award of the commissioner, attached also is a transcript of the evidence produced before the deputy commissioner. I have certified copies of those here also, which I can formally offer in evidence. I think it will serve every purpose unless there are objections, if they are considered in evidence, the exhibits attached to the bill of complaint as plaintiff's exhibits, having been so recited by me.

Mr. Neumann: I think I agreed to a stipulation, signed a stipulation to that effect sometime ago.

Mr. Folonie: Yes, counsel has so stipulated with me outside of the record. I will take his verbal stipulation here in court, that they may be so admitted.

The Court: They may be admitted.

Which said exhibits are in words and figures as follows, to wit:

132 Mr. Folonie: We rest.

The plaintiffs here rested their case.

The Court: What do you say about this? I am not familiar with this type of a case, but on this whole question here whether or not he was a member of the crew—

Mr. Folonie: That is all there is to this case.

The Court: Hasn't there been any decision?

Mr. Folonie: Yes.

The Court: I have not time to go into it. I am not familiar with it.

Mr. Neuman: It is an appeal from an examining man like an examining magistrate.

Mr. Folonie: There is one question here whether he is a member of the crew or is not. That is all there is to this case.

The Court: All right, I will hear you tomorrow morning.

(Whereupon the further hearing of the above entitled cause was adjourned to Friday, July 8, 1938, at ten o'clock A. M.)

133 South Chicago Coal & Dock Company, an Illinois Corporation, and London Guarantee & Accident, Ltd.,

Plaintiffs,

vs.
Harry W. Bassett, Etc.,

Defendant.

Before Judge Phillip L. Sullivan.

Friday, July 8, 1938,
Ten o'clock A. M.

Court met pursuant to adjournment.

Present: Same as before.

The Court: All right gentlemen, you haven't any evidence!

Mr. Neuman: Only this, if the Court please, in the event that Your Honor is going to grant their motion for a trial De Novo, at this time, I would like to move that the testimony introduced before the commissioner, the deputy commissioner, the original hearing, be considered part of the testimony or evidence before Your Honor. In other words, I want the record to show that.

Mr. Folonie: The motion is that the evidence I have offered which might be part of what transpired might be considered as evidence here before the court. I have 134 no objection to that.

The Court: All right.

Mr. Folonie: I want to reopen my case just for one point, and that is I failed to offer the certificate of enrollment of the vessel. Counsel has said informally, I think, that the vessel Koal Kraft was a duly licensed vessel of the United States at the time of the occurrence. Is there any question as to that?

Mr. Neuman: No question.

(Arguments of counsel.)

135 The Court: It seems to me from the facts in this case, the one witness who testified yesterday, he had to have a crew irrespective of what training, and this man was on this boat doing the work he did, and irrespective of his position, I think he was a member of the crew, and there will be a finding as to that, and the conclusions of law will be held.

Mr. Neuman: If the court please, may we submit briefs on this question?

The Court: No, I think I have heard you. There is no need of delaying it.

Mr. Folonie: I am satisfied we have brought to the attention of the court all the cases there are, that have arisen under this act. We have run down the citations. These are the ones we find on the materiality.

Mark that "held" in the margin.

The Court: Mark it "held" or "refused".

Mr. Folonie: I believe that is the practice, Your Honor.

The Court: All right, gentlemen.

Mr. Neuman: Let the record show exception is made to the findings.

101 NARRATIVE OF EVIDENCE AND PROCEEDINGS AT THE TRIAL OR HEARING.

And on the hearing of said cause the counsel for plaintiffs stated that the parties had, in writing, stipulated that Exhibits "A," "B" and "C," attached to the Bill of Complaint, might be offered in evidence by either party and received in evidence without further proof of correctness and authenticity, and without prejudice to rights of the plaintiffs or defendant to offer such other or further competent evidence as they should see fit.

Counsel for defendant stated this was a correct statement of the stipulation of the parties and, thereupon, said Exhibits "A", "B" and "C", attached to the Bill of Complaint, were then and there offered and received in evidence by the Court (not here again reproduced).

Thereupon counsel for appellees offered his statement as equivalent to evidence that the plaintiffs had filed their answer before the Commissioner, as in the Bill of Complaint alleged, which counsel for appellant then and there admitted.

Thereupon appellees presented witness ARTHUR J. SPOTTON, who testified as follows:

I am master of the Steamer "Koalkraft" and was at the time of the death of John Schumann. The "Koalkraft" was a vessel of the United States, 174 feet long and 40 feet beam, which, under the regulations of the Government Vessel Inspectors, was required to have a crew of master,

102 chief engineer, fireman, and three deckhands. The same thing was required under our enrollment and the Certificate of Inspection produced and bearing the signature of the Inspector of Hulls and Inspector of Boilers; which provides:

The steam vessel "Koalkraft", a vessel propelled by steam, of Chicago, Illinois, has been inspected and is of 376 gross tons. She "may be operated not to exceed 12 hours out of any 24 hours, with 1 licensed master and pilot, 1 licensed chief engineer, 3 seamen, 1 fireman."

This was the inspection certificate in force at the time of the death of Schumann.

Schumann was engaged on the vessel as a deckhand, and all his duties were on the vessel. He at no time did any work except on board the ship, and his work consisted of making fast and loosening lines; keeping the vessel and her decks clean and polished; assisting the engineer and fireman in firing the engine; and when the vessel was coaling other vessels (which was her business), the coal being taken on from the dock, running in a chute, would require that he stand on the deck of the vessel and punch it with a stick from time to time to keep it running freely, and perform similar duty when the vessel was delivering her coal to another vessel which was being coaled.

The "Koalkraft" was, at the time, working in the harbor of the Calumet River in Illinois, and her duties were entirely within the harbor at that time in transporting coal from a dock to the vessel being coaled.

Schumann was on board when we cast off the lines at the dock, and when we reached the vessel to be coaled he was missing. I saw his body some days later when it was found in Calumet Harbor.

103. On cross-examination, witness stated that neither Schumann nor any other member of the crew ate or slept on board the "Koalkraft" and that when a vessel was to be coaled they were called by telephone and reported for duty.

On question to the witness whether it was not a fact that Schumann was only a laborer, witness stated that he performed the duties ordinarily exercised by a deckhand, and that the work of such deckhand was, in the main, laboring work, including the making and loosening of lines and other work to which they might be put on board the vessel.

Thereupon the plaintiffs produced PETTER J. PETTERSEN, and counsel for plaintiffs stated in open court he expected to prove by this witness that he is the Vessel Inspector of the United States; that he issued the Certifi-

cate of Inspection to this vessel, and that as part of her crew, to permit her to run, she was required to have a master, engineer, fireman, and three deckhands, and that in the absence of such a crew she would not be permitted to navigate.

Counsel for plaintiffs asked counsel for defendant if he would stipulate that the witness would so testify and accept the statement as sworn testimony of the witness, and defendant's counsel stated he would so stipulate.

Thereupon the plaintiffs produced witness RAYMOND KESSLER, who testified as follows:

I was fireman on the "Koalkraft" on October 31, 1937, when John Schumann came to his death. He was on board the "Koalkraft" after we had left the dock and our lines were clear. I missed him before we reached the vessel 104 we were coaling. He evidently fell overboard. It is not correct to state that he fell into the water while the "Koalkraft" was still moored to the dock. I saw his body when it was recovered some days later and it was found in Calumet Harbor. I worked with him for some weeks. All his duties were performed on the vessel and none on shore. He was a deckhand, doing deckhand work.

Thereupon plaintiffs' counsel stated:

"We have here the answer of plaintiffs' to the employee's claim for compensation as filed in the office of the Deputy Commissioner before the hearing had before the Commissioner."

The material part of such answer so presented, offered and received in evidence, is as follows:

"It is denied that both the employer and employee were subject to the Longshoremen's and Harbor Workers' Compensation Act at the time of the alleged injury."

The foregoing was all the evidence produced or received at the hearing of the above cause.

105 The foregoing narrative of testimony, evidence and proceedings at the trial or hearing is filed on behalf of plaintiffs in connection with designation of record upon appeal to the Circuit Court of Appeals, and I do further state that the above case was stenographically reported by reporters for both plaintiffs and defendant on the trial, and the foregoing narrative is a fair narrative statement of all evidence produced on the trial.

Robert J. Folonie,
Attorney for Plaintiffs.

138

PLAINTIFFS' EXHIBIT 1.

(Covered by certificate filed Dec. 6, 1938.)

This Certificate Expires March 20th, 1938.

UNITED STATES OF AMERICA.

DEPARTMENT OF COMMERCE.

Bureau of Marine Inspection and Navigation.

Boiler mountings and studs examined on March 20, 1937
by U. S. Local Inspectors, Chicago, Ill.

PGP

W. N.

Certificate of Inspection.

For Steam or Motor Vessel.

State of Illinois
District of Chicago, Ill.

Freight (Fuel Lighter) Steam Vessel Koalkraft.

Application in writing having been made to the undersigned, Inspectors for this District, to inspect the above-named vessel propelled by steam, of Chicago, in the State of Illinois whereof South Chicago Coal & Dock Company is owner, and Arthur J. Spotton is Master, said inspectors, having completed the inspection of the vessel on the 20th day of March, 1937, Do Certify that the said vessel was built at Chicago, in the State of Illinois, in the year 1913; rebuilt in the year 1925; that the Hull is constructed of steel; and, as shown by official records, is of 376 gross tons; that the said vessel has _____ Staterooms and _____ Berths, and is allowed to carry _____ passengers, viz.: _____ First cabin, _____ Second cabin, and _____ Deck or Steerage Passengers.

Included in the entire crew hereinafter specified and designated there must be 1 certificated lifeboat men. May be operated not to exceed 12 hours but of any 24 hours with 1 licensed master and pilot, 1 licensed chief engineer, 3 seamen, 1 fireman. When navigating nighttime one of the crew must be on watch in or near the pilot house besides the regular pilot on watch. When navigating under this endorsement on route between Calumet Harbor, Ill.

and Indiana Harbor, Ind., 2 of the seamen required must be able seamen and one additional fireman must be carried. Also is required to carry a full complement of licensed officers and crew, consisting of _____ Master, 1 Master and Pilot, 1 First Class Pilot, _____ Chief Mate, _____ Second Mate, _____ Third Mate, _____ Inland Mate, _____ Chief Mate and Pilot, _____ Second Mate and Pilot, _____ Third Mate and Pilot, _____ Inland Mate and Pilot, _____ Quartermaster, 4 Able Seamen, 2 Seamen, _____ Apprentices, _____ Deck Hand, 1 Chief Engineer, 1 First Assistant Engineer, _____ Second Assistant Engineer, _____ Third Assistant Engineer, _____ Junior Engineer, _____ Water Tender, _____ Oiler, 3 Firemen, _____ Coal Passer, _____ Wiper, _____ Watchmen, and also _____ persons when needed in Steward's and other departments not connected with the navigation of the vessel; that the said vessel is provided with 2 Single Vert. Non-Condensing Engine of 14, 14 inches diameters of cylinders and 3½ feet stroke of piston, and 1 Boiler, 12 feet in length and 114 inches in diameter, made of lawful steel, in the year 1906, rebuilt in the year 1_____. The said vessel is permitted to navigate, for one year, the waters of the Calumet River and Harbor, also Indiana Harbor and River, and may be navigated between South Chicago and Indiana Harbor with the aid of a tug. between _____, and touching at intermediate ports, a distance of about _____ miles and return.

We Further Certify that the said vessel at the date hereof is, in all things, in conformity with the laws governing the Bureau of Navigation and Steamboat Inspection and the Rules and Regulations of the Board of Supervising Inspectors.

The Following Particulars of Inspection Are Enumerated, Namely:

Anchors,	No. 2
Cables,	No. 1
Has signal lights Yes.	7" x 11"
Metal lifeboats (198 c. f.)	No. 2
Wooden lifeboats.....	No. _____
Working boat.....	No. _____
Collapsible lifeboats.....	No. _____
Every lifeboat has equipment in accordance with the rules. Yes.	
Life rafts (15 persons)	No. 1
Life preservers for adults.....	No. 13
Life preservers for children.....	No. _____

Auxiliary life-saving appliances, No. and kind
 2 Ring life buoys, 2 Luminous ring life buoys
 Has line-carrying projectiles, and means of
 propelling them
 Fire Extinguishers..... No. 3
 Portable hand fire pumps..... No. _____
 Double-acting hand fire pumps..... No. 1
 Fire hose, total length of..... 150 feet.
 Fire buckets..... No. _____
 Water barrels..... No. _____
 Water tanks..... No. _____
 Axes..... No. 4
 Date when shaft was last drawn.....

Main Boilers.

Boiler plate:

Thickness of..... .715"
 Tensile strength of..... 65,000#
 Record in local inspectors' office at Mil-
 waukee, Wis.

Boiler shell drilled May 15, 1932.

Thickness of plate found..... .720"

Longitudinal seams triple riveted.

Holes drilled.

Maximum steam pressure allowed..... 140 lbs.
 Hydrostatic pressure applied..... 175 lbs.
 Main steam pipe, thickness of..... .369"
 Feed pumps for blrs..... 2
 Steam fire pumps, double-acting..... No. 1

Donkey Boilers.

No. None When built, 1

Diameter of

Thickness of plate

Tensile strength of plate

Record in local inspectors' office at

Maximum steam pressure allowed to donkey boiler, _____
 pounds.Hydrostatic pressure applied to donkey boiler, _____
 pounds.

Petter G. Pettersen,
Acting Inspector of Hulls.
 William Nicholas,
Inspector of Boilers.

State of Illinois, } ss.
County of Cook. }

Subscribed and sworn to before me this 24th day of March, 1937, by Petter G. Pettersen, Acting Inspector of Hulls, and by William Nicholas, Inspector of Boilers.

Arthur E. Schutt,
(Seal) *Notary Public.*

My commission expires May 7, 1939.

Office of U. S. Local Inspectors,

District of (Port) Chicago, Ill., Mar. 24, 1937.

We Hereby Certify that the above certificate is a true copy of the original issued by this office to the vessel named herein.

Petter G. Pettersen,
(Acting) Inspector of Hulls.
William Nicholas,
Inspector of Boilers.

On vessels of over 25 gross tons, the original certificate must be framed under glass and posted in a conspicuous place in the vessel where it will be most likely to be observed by passengers and others. On vessels of not over 25 gross tons, the original certificate must be kept on board to be shown on demand. (Section 4423, Revised Statutes.)

Steam pleasure yachts are forbidden to carry merchandise or passengers for pay, unless upon change of character by the Inspectors of the Bureau of Navigation and Steamboat Inspection.

79 And on, to wit, the 8th day of July, 1938, there was filed in the Clerk's office of said Court a certain Conclusions of Law, in words and figures following, to wit:

80 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—15968) * *

Come now the plaintiffs in the above cause, by McKinney, Folonie & Grear, and respectfully present Conclusions of Law, hereto appended, and pray that the Court may hold the same and adopt them, and each of them, and mark the same, and each of them, "Held."
(Held)

McKinney, Folonie & Grear,
Attorneys for Plaintiffs.

81

CONCLUSIONS OF LAW.

Filed
July 8,
1938.

1.

Under the evidence herein, the court finds as a matter of law that the "Koal Kraft" was required to have a crew of thirteen men, but was permitted to operate not to exceed twelve hours out of any twenty-four, with a crew of one licensed master and pilot, one licensed chief engineer, three seamen, and one fireman.

82

2.

Plaintiff, South Chicago Coal & Dock Company, is not liable for the payment of any compensation under the "Longshoremen's and Harbor Workers Compensation Act" (44 Statutes, 1424; 33 USCA, Chap. 18), for the death of John Schumann.

83

3.

Under the law, a member of the crew of a vessel is not, nor is the owner of such vessel, subject to the jurisdiction of the Commissioner or Deputy Commissioner under "Longshoremen's and Harbor Workers Compensation Act," justifying any award of compensation for the death of a deck hand, a member of the crew, and no jurisdiction existed in the Deputy Cmmisioner to make any award of compensation for the death of John Schumann.

Approved:—

Philip L. Sullivan,
Judge.

84. And on, to wit, the 8th day of July, 1938, there was filed in the Clerk's office of said Court a certain Findings of Fact, in words and figures following, to wit:

Filed
July 8,
1938.

85. IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—15968) • •

Come now the plaintiffs in the above cause, by McKinney, Folonie & Grear, their attorneys, and respectfully request that the Court make, hold and place on file Findings of Fact, and plaintiffs herewith submit proposed Findings of Fact and request that the Court may mark them, and each of them, "Held" and place the same on file as part of the record in said cause.

McKinney, Folonie & Grear,
Attorneys for Plaintiffs.

FINDINGS OF FACT.

1.

On October 31, 1937, John Schumann came to his death by drowning in the Calumet River while employed by the plaintiff, South Chicago Coal & Dock Company, on its vessel, the "Koal Kraft."

2.

The drowning of John Schumann occurred by reason of his being lost from the vessel, "Koal Kraft," while it was navigating the Calumet Harbor and River, navigable waters of the United States.

3.

John Schumann, at the time of his being lost, was employed by the plaintiff, South Chicago Coal & Dock Company, as a deck hand on the vessel "Koal Kraft," and as such his duties consisted in making lines fast, loosing them, keeping the vessel clean, and various duties incident to fueling vessels, in which trade the said vessel was at that time engaged.

4.

John Schumann, during his employment by the plaintiff, South Chicago Coal & Dock Company, performed the duties of a deck hand aboard the vessel "Koal Kraft" and at the time of his being lost therefrom, the said vessel was being navigated in the Calumet River between the plaintiff's (South Chicago Coal & Dock Company) dock at 95th Street and the Calumet River, north of the 95th Street bridge in Cook County, Illinois, and the vessel "Ashley", then lying at 104th Street and the Calumet River in said Cook County, Illinois. John Schumann was lost from the "Koal Kraft" after it had passed to the south of the 95th Street bridge and before it reached the "Ashley."

5.

John Schumann, at the time of his being lost from the "Koal Kraft", was a seaman employed thereon as a deck hand.

6.

On October 31, 1937, the said vessel was being operated not to exceed 12 hours of that-day, and the members of the crew, at the beginning of the voyage during which John Schumann was lost overboard, were Arthur J. Spotton, Master; Harry Zivney, Engineer; John Schumann, Joe Kete and George Gornick, deck hands; and Raymond Kersten, Fireman.

7.

John Schumann, at the time of his being lost from the vessel "Koal Kraft," was a member of the crew of that vessel. (Held)

8.

John Schumann, at the time of his coming to his death by drowning, was not within the coverage of the "Longshoremen's and Harbor Workers Compensation Act." (44 Statutes 1424; 33 USCA Chap. 18.)

9.

The steamship "Koal Kraft" was, at the time of the death of John Schumann, a vessel of the United States engaged in harbor navigation, with a crew and ship's papers.

Approved:

Philip L. Sullivan,
Judge.

89 And afterwards, to wit, on the 8th day of July, 1938, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Philip L. Sullivan, District Judge, appears the following entry, to wit: Decree.

90 IN THE DISTRICT COURT OF THE UNITED STATES.

• • (Caption—15968) • •

DECREE.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

1. The preliminary injunction or injunctional order, heretofore entered in this cause on the 8th day of March, 1938, staying the payment of the amounts prescribed and required by the award of the defendant, theretofore made under the terms and provisions of the "Longshoremen's and Harbor Workers Compensation Act," on account of the death of John Schumann, to the Brown Funeral Home, Samuel J. Spiegel, and Mary Schumann, for her own use and for the use and benefit of Jeanette Schumann, and restraining the defendant from enforcing the payment of those amounts to the persons above named, be and the same hereby is made permanent and perpetual against the said defendant.

2. The payments made by the plaintiffs to Mary Schumann, for her own use and for the use and benefit of Jeanette Schumann, in accordance with the permission granted in said order of March 8, 1938, shall not be recovered by the plaintiffs from the said Mary Schumann; nor shall the plaintiffs hereafter make or be required to make any such further payments pending any appeal by the defendant herein from this decree to the United States Circuit Court of Appeals or to the United States Supreme Court or in any otherwise.

3. The award of compensation, heretofore made on February 21, 1938 by the defendant, as Deputy Commissioner of United States Employees' Compensation Commission, Tenth Compensation District, under the terms and provisions of the "Longshoremen's and Harbor Workers Compensation Act," to be paid by the plaintiffs on account of the death of John Schumann to the Brown Funeral Home, Samuel J. Spiegel, and Mary Schumann, for her own use and for the use and benefit of Jeanette Schumann, be, and the same is, hereby vacated and set aside and held for naught.

4. Defendant, his agents, servants, or anyone acting by, through or for him, are further permanently restrained and enjoined from in anywise attempting to enforce, or enforcing, payments of the amounts prescribed and required to be made by the plaintiffs by the said award of compensation made by the defendant on February 21, 1938, under the terms and provisions of the "Longshoremen's and Harbor Workers Compensation Act," on account of the death of John Schumann.

Enter:

Philip L. Sullivan,
District Judge.

92 And on, to wit, the 6th day of October, 1938, came ^{Filed Oct. 6, 1938.} the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice of Appeal, in words and figures following, to wit:

93 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

• • (Caption—15968) • •

NOTICE.

Notice is hereby given that Harry W. Bassett, Deputy Commissioner of United States Employees Compensation Commission, Tenth Compensation District, defendant above-named, hereby appeals to the United States Circuit Court of Appeal for the Seventh Circuit from the decree filed and entered in this action on July 8, 1938.

M. L. Igoe,
Attorney for appellant, Harry W. Bassett.

Address:

826, United States Court House,
Chicago, Illinois.

October 6, A. D. 1938.

96 And on, to wit, the 12th day of October, 1938, came ^{Filed Oct. 12, 1938.} the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Statement of Points, in words and figures following, to wit:

97 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

• • (Caption—15968) • •

STATEMENT OF POINTS.

Now comes the said defendant-appellant in the above entitled cause, by Michael L. Igoe, United States Attorney for the Northern District of Illinois, his attorney, and filed the following Statement of Points upon which he will rely in the prosecution of the appeal petitioned for in said

cause from the decree of this Court entered on the 8th day of July, A. D. 1938:

First. That the Court erred in granting to the plaintiffs herein a trial de novo.

Second. That the Court erred in holding plaintiffs' findings of fact and conclusions of law that the deceased, John Schumann, was a member of the crew of the vessel on which he was working.

Third. That the Court erred in refusing to review the transcript of record of the hearing and testimony taken in the hearing before the Deputy Commissioner of the United States Employees Compensation Commission, Tenth Compensation District.

98 Fourth. That the Court erred in not holding as final the Deputy Commissioner's conclusions as to facts, which were reasonably supported by evidence, introduced in a hearing had in accordance with law.

Fifth. That the Court erred in setting aside the Deputy Commissioner's award.

M. L. Igoe,
United States Attorney,
Attorney for defendant-appellant.

Dated at Chicago, Illinois, this 12th day of October, A. D. 1938.

Filed
Oct. 12,
1938

94 And on, to wit, the 12th day of October, 1938, came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Designation for Record, in words and figures following, to wit:

95 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA.

• • (Caption—15968) • •

APPELLANT'S DESIGNATION FOR RECORD.

To: Henry W. Freeman, Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

Please prepare record for defendant's appeal to the United States Circuit Court of Appeals, Seventh Circuit, said record to consist of copies of the following documents:

1. Plaintiff's petition for injunction.

2. Defendant's answer.
3. Plaintiff's conclusions of law and findings of fact.
4. Final decree of court dated July 8, 1938.
5. Defendant's notice of appeal.
6. Appellant's statement of points.
7. Appellant's designation for record.

M: L. Igoe,
Michael L. Igoe,
United States Attorney.

99 And on, to wit, the 14th day of October, 1938, came
the Plaintiffs by their attorneys and filed in the Clerk's
office of said Court their certain Designation for Record
together with Narrative of Evidence and Proceedings at
the Trial or Hearing, in words and figures following, to
wit:

Filed
Oct. 14,
1938.

100 IN THE DISTRICT COURT OF THE UNITED STATES
OF AMERICA.

• • (Caption—15968) • •

APPELLEES' DESIGNATION FOR RECORD.

Appellees designate for the record, to be transmitted to the United States Circuit Court of Appeals, the narrative statement of the evidence and proceedings at the trial, which appellees say was stenographically reported, and pray that the appellant may be required to file two copies of the Reporter's transcript of the evidence or proceedings if appellant be not content with narrative herewith presented.

Appellees attach hereto a narrative of the testimony, evidence and proceedings at the trial in District Court and pray that the same may be included in the record.

Robert J. Folonie,
Attorney for Appellees.

Certificate of Clerk.

136 Northern District of Illinois } ss.
Eastern Division

I, Henry W. Freeman, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Designations filed in this Court in the cause entitled South Chicago Coal & Dock Company, an Illinois corporation, and London Guarantee & Accident Company, Ltd., vs. Harry W. Bassett, Deputy Commissioner of United States Employees' Compensation Commission, Tenth Compensation District, Equity No. 15968, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 14th day of November, A. D. 1938.

Henry W. Freeman,

(Seal)

Clerk.

137 IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois,

Eastern Division.

South Chicago Coal and Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd.,

vs.

Harry W. Bassett, Deputy Commissioner of United States Employees' Compensation Commission, Tenth Compensation District.

Equity No. 15968.

I, Henry W. Freeman, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a copy of the Certificate of Inspection for the vessel Koal Kraft, issued on March 24, 1937 by the Bureau of Marine Inspection and Navigation of the Department of Commerce of the United States of America, which was offered and received in evidence as Plaintiffs' Exhibit Number 1 upon the trial of

this cause before the Honorable Philip L. Sullivan, one of the Judges of the District Court of the United States for the Northern District of Illinois, and which is hereby certified to the Clerk of the Circuit Court of Appeals as an Exhibit in this cause to be incorporated in the report of proceedings and to become a part of the record on appeal in this cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 5th day of December, A. D. 1938.

Henry W. Freeman,

Clerk,

(Seal)

By Edward E. Douglas,
Acting Clerk.

139 Endorsed: Filed Dec 6, 1937, Frederick G. Campbell, Clerk.

140 IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Filed
Dec. 16,
1938.

For the 7th Circuit.

South Chicago Coal and Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,
vs.

Harry W. Bassett, Deputy Commissioner of United States Employees Compensation Division, Tenth Compensation District,

Defendant-Appellant.

Number 6808.

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the parties hereto, by their respective attorneys, that the document heretofore certified by the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, to be Exhibit Number 1, and being a copy of a Certificate of Inspection for the vessel Koal Kraft, issued on March 24, 1937 by the Bureau of Marine Inspection and Navigation of the Department of Commerce of the United States of America, was introduced in evidence

Stipulation.

as plaintiffs' Exhibit Number 1 upon the trial of this cause, and that it may be filed as such Exhibit with the Clerk of the United States Circuit Court of Appeals for the 7th District as a part of the evidence, as matter omitted from the evidence and proceedings at the trial, and may be made a part of the record on appeal in this cause and printed in the transcript of the record in this cause.

Robert J. Folonie,
Attorney for Plaintiffs-Appellees.
William J. Campbell,
Attorney for Defendant Appellant.

Endorsed: Filed Dec. 6, 1937, Frederick G. Campbell,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 78, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the twenty-eighth day of December, 1938, upon which the following entitled cause was heard and determined:

South Chicago Coal & Dock Company, an Illinois Corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,

vs.

Harry W. Bassett, Deputy Commissioner of United States Employees Compensation Commission, Tenth Compensation District,

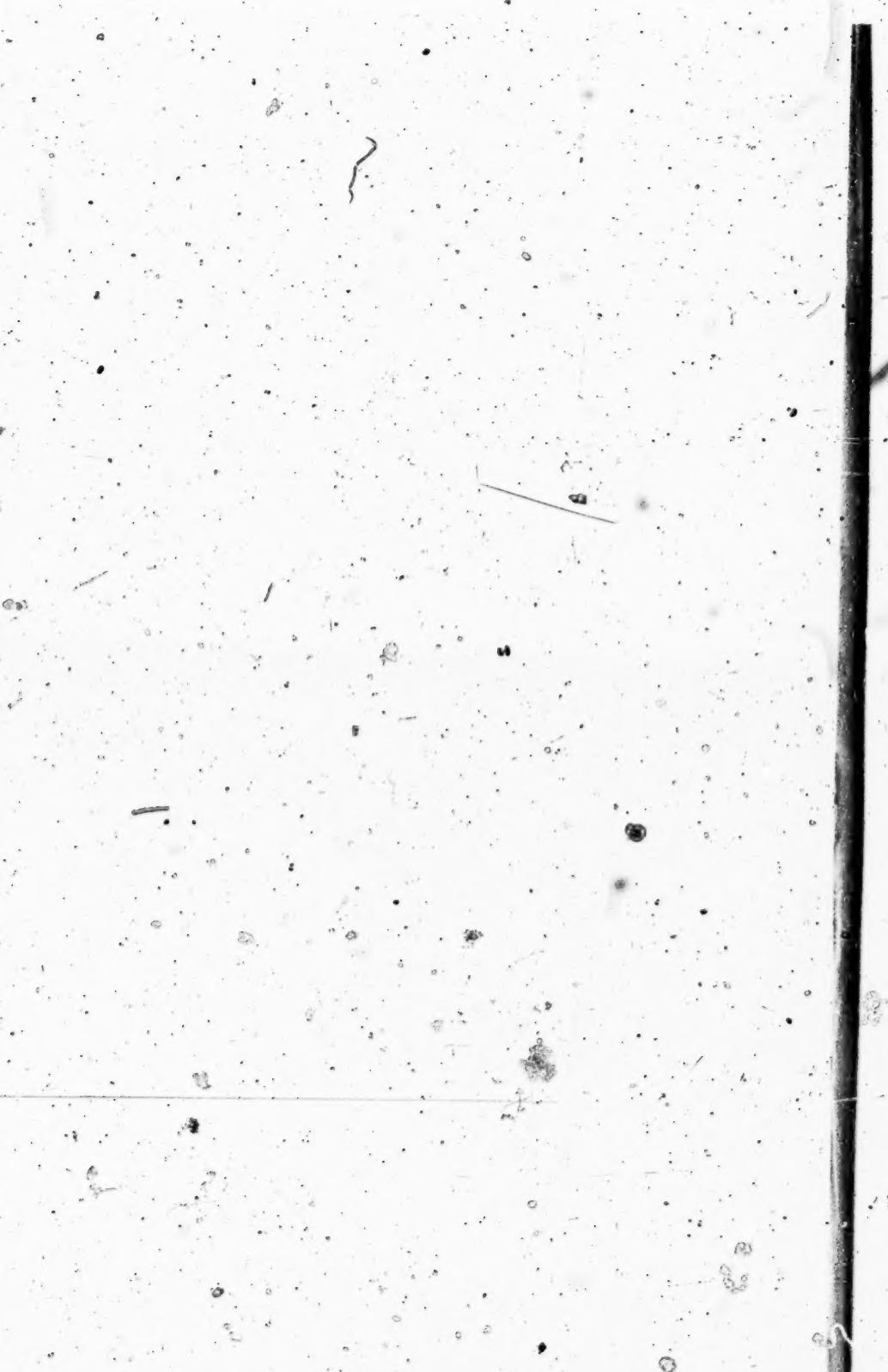
Defendant-Appellant,

No. 6808, October Term, 1938; as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 17th day of July A. D. 1939.

(Seal)

Frederick G. Campbell,
Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.



At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago and begun on the fourth day of October, in the year of our Lord one thousand nine hundred and thirty-eight, and of our Independence the one hundred and sixty-third.

South Chicago Coal & Dock Company, an Illinois Corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiff-Appellee,

6808

vs.

Harry W. Bassett, Deputy Commissioner of United States Employees Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

And, to-wit: On the seventeenth day of November, 1938, there was filed in the office of the Clerk of this Court, an appearance of counsel for Appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 6808.

October Term, 1938.

South Chicago Coal and Dock Company, *et al.*,

vs.

Harry W. Bassett, Deputy Commissioner, etc.

The Clerk will enter my appearance as counsel for Appellant.

M. L. Igoe,
United States Attorney.

Endorsed: Filed November 17, 1938. Frederick G. Campbell, Clerk.

Appearance for Appellee.

And afterwards, to-wit: On the nineteenth day of November, 1938, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 6808.

October Term, 1938.

South Chicago Coal and Dock Company, *et al.*,

vs.

Harry W. Bassett, Deputy Commissioner, etc.

The Clerk will enter my appearance as counsel for appellee.

Robert J. Folonie,
105 W. Adams Street,
Chicago, Illinois.

Endorsed: Filed November 19, 1938. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the sixth day of December, 1938, there was filed in the office of the Clerk of this Court, a Stipulation as to Plaintiff's Exhibit 1, which said Stipulation is not copied here as the same appears on pages 77 and 78 of the printed record in this cause, certified herewith under a separate certificate.

And on the same day, to-wit: On the sixth day of December, 1938, there was filed in the office of the Clerk of this Court, a Certified Copy of Plaintiff's Exhibit 1, which said Exhibit is not copied here as the same appears on pages 65 to 68 inclusive of the printed record in this cause, certified herewith under a separate certificate.

And afterwards, to-wit: On the twenty-fourth day of April, 1939, the following further proceedings were had entered of record, to-wit:

Monday, April 24, 1939.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Hon. J. Earl Major, Circuit Judge.

Hon. Walter E. Treanor, Circuit Judge.

South Chicago Coal and Dock Company, et al.,

Plaintiffs-Appellees,

6808

vs.

Harry W. Bassett, Deputy Commissioner, etc.

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause comes on to be heard on the transcript of the record and briefs of counsel and on oral argument by Mr. David H. Neuman, counsel for appellant, and by Mr. Robert J. Folonie, counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the eleventh day of May, 1939, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

For the Seventh Circuit.

No. 6808.

October Term, 1938, April Session, 1939.

SOUTH CHICAGO COAL & DOCK COMPANY, an Illinois corporation, and LONDON GUARANTEE AND ACCIDENT COMPANY, LTD.,

Plaintiffs-Appellees.

HARRY W. BASSETT, Deputy Commissioner of United States Employees Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

May 11, 1939.

Before EVANS, MAJOR, and TREANOR, *Circuit Judges.*

EVANS, *Circuit Judge.* This appeal is from an injunction issued by the District Court against the enforcement of a deputy commissioner's award under the Federal Longshoremen's Compensation Act, to the widow and infant daughter of deceased, who was drowned, October 31, 1937, in the Calumet River, while working on a fueling boat, the Koal Kraft.

Section 3 of the Longshoremen's Act excepts from its operation a "member of a crew." The deputy commissioner, after a full hearing, found deceased was *not* a "member of a crew." On the trial *de novo* in the District Court, the court found deceased *was* a member of a crew. The evidence taken at both hearings was similar.

Was the deceased's status as seaman or longshoreman a "jurisdictional, fundamental fact"? If so, then the District Court must pass on the issue, upon evidence adduced

before it. *Crowell v. Benson*, 285 U. S. 22. If it is not fundamental and jurisdictional, the deputy commissioner makes the finding which is conclusive if supported by evidence. *Voehl v. Indemnity Ins. Co.*, 288 U. S. 162.

Section 3 (33 U. S. C. A. Sec. 903) provides:

"(a) Compensation shall be payable under this chapter in respect of the death of an employee, but only if the death results from an injury occurring upon the navigable waters of the United States. No compensation shall be payable in respect of death of—

"(1) A master or member of a crew.

"(2) . . .

"(b) No compensation shall be payable if the injury was occasioned solely by the willful intention of the employee to kill himself."

Section 919 provides for the filing of the claim with the Commissioner who "shall have full power and authority to hear and determine all questions in respect of such claim." Section 920 provides that in "any proceeding for the enforcement of a claim for compensation it shall be presumed, in the absence of substantial evidence to the contrary—(a) that the claim comes within the provisions of the act . . ."

The Facts. The vessel, the Koal Kraft, on which deceased was employed, was used solely for fueling other vessels. It operated about eight months a year in the territory of the Calumet River (concededly a navigable water). It supplied coal to other vessels on their order, each operation consuming only a couple of hours. It had no sleeping or eating quarters. Its certificate of inspection required that "Included in the entire crew hereinafter specified and designated there must be 1 licensed master and pilot, 1 licensed chief engineer, 3 seamen, 1 fireman." If deceased were counted as a member of the crew, the full complement of the ship was present. Otherwise not.

Deceased had been in the employ of appellee from October 5th to the 31st, only, a total of 269 hours, at an hourly wage of sixty cents. He was paid semi-monthly—in all \$161.40. His chief task was in facilitating the flow of coal from his boat to the vessel being fueled—removing obstructions to the flow with a stick. He performed such additional tasks as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties. He occasionally did some cleaning of the boat. He did no work

while the boat was en route from dock to the vessel to be fueled.

Pertinent excerpts from the record relative to deceased's duties are set forth in the margin.*

* The Captain, testifying before the Deputy Commissioner:

"Q. And among the deckhands you claim the deceased was one? A. Yes, Sir.

"Q. Those, with yourself, constituted the crew of this vessel? A. Yes, sir.

"Q. Can you tell me what Schumann's duties were while he was working on this boat? A. Why, he was a deck hand and he did general deck work. He handled lines, got on the dock and took the stern line and made it fast and on leaving the dock he threw the stern line off the dock.

"Q. Did he assist the fireman at any time? A. Why, yes, they were all willing to take an interest in learning to fire so in case the fireman got sick we could have a man to replace him.

"Q. Under what status was he paid? I mean by that, was he paid as a seaman or sailor or deck hand? A. He was paid as a deck hand, as a member of the crew of the boat Koal Kraft.

"Q. He took orders solely from you, is that right, Captain? A. Yes, sir.

"Q. You say he worked with the fireman on the day he was injured? A. Yes, Sir. That is, he handled the line. The fireman ran the winch that operates the line and he passed the line off the dock, or put it on the dock, whatever the occasion would be.

"Q. In employing this kind of help they sign no papers, do they? A. No, sir. * * * No local boat signs any articles.

"Q. You say his duties were those of a deck hand? A. Yes.

"Q. What are the duties of a deck hand on a boat of this sort? A. Well, just general labor, keeping it clean, handling the lines, painting or whatever you ask him to do.

"Q. Do they have to have any experience when they come on there, any kind of experience as seamen or sailors? * * * A. No, sir.

"Q. They come on like laborers? A. Yes. They pick up the work as they work along there.

"Q. * * * Now, as a matter of fact, Schumann was called in only by telephone to come whenever there was work? A. Yes, sir.

"Q. Otherwise he was staying home waiting for a call to come to work? A. Yes, sir.

"Q. He was a plain laborer? A. Yes, sir. In other words, he was called a deck hand.

"Q. Now, he did not participate in any of the navigation of the boat, did he? A. No, sir.

"Q. Isn't it a fact that the man's main work consisted of coaling up the steamboat, when the boat came up it was his duty to coal up the steamboat? A. No, while discharging the coal his duty was to keep the coal running in these hoppers up on deck with a pole.

"Q. If there was no work he didn't have any claim on you, if there was no work he would not come and ask for work. Isn't that correct? A. Why, no.

"Q. He would only come when you called him? A. Why yes. Well, generally he knew when he went home at night whether to wait for a call or come out the next day.

"Q. There was no obligation on your part to give him work? A. No, sir."

The fireman of the Koal Kraft testified before the Commissioner:

"Q. Did you know John Schumann? A. Yes, sir.

Presented for determination is the line of demarcation between the duties of the deputy commissioner and those of the District Court. The generalization is accepted that the determination of "jurisdictional facts" is reserved to the courts while issues involving "circumstances, nature, extent and consequences of injuries" are for the commissioner. The court's review of the commissioner's action, through an injunction suit, is limited. As to these latter questions, the court is limited to an ascertainment of any supporting evidence, while questions involving "jurisdictional" controversies are determinable by the court in a trial *de novo*. This differentiation of jurisdiction is derived from our constitutional theory,—the Federal Congress may not impose a liability on an employer except by virtue of the existence and involvement of the two factors—(1) navigable waters, and (2) master and servant relationship. And the determination of the existence of these two jurisdictional prerequisites may not be left to the decision of an administrative tribunal, but must be lodged in a court. (*Crowell v. Benson, supra.*) Other issues may, however, be left to administrative determination, and such findings are conclusive if supported by evidence.*

"Q. What part of the crew was he? A. He was on the after deck, a deck hand on the after deck.

"Q. What were his duties? A. Well, his duties, his main duty was to poke down the coal from the hopper on to the belt when it stuck there. He also put the line on the winch, he stood there and gave me signals. When the boat was tied up he went up and pushed coal down.

"Q. * * * did he do any work other than that occasionally? A. Well, he went down below and helped scrub the deck down there. * * * Any painting that was necessary to be done on the boat was a part of his job. The deck hand maintained the outside of the boat and inside.

"Q. You say the deck hands have nothing to do with the steering or with the navigation of the boat? A. No, they don't.

"Q. And while the boat is in motion the deck hands really have nothing to do? A. Well, I would say the deck hand has nothing to do except when there is an emergency breakdown * * *.

"Q. You said before that the main duty of John Schumann was to refuel this steamboat when your coal barge would come to it? That was his main duty? A. Yes.

"Q. Now, while he was working there he never slept there in the boat? A. No.

"Q. He stayed at home and was called whenever there was work? A. Yes.

"Q. That applied to all of you. A. Yes.

* * Commissioner's finding on issues other than jurisdictional are final if supported by evidence: *Del Vecchia v. Bowers*, 296 U. S. 280; *Voehl v. Indemnity Co.*, 288 U. S. 162; *Salmon Bay Sand & Gravel Co. v. Marshall*, 93 F. (2d) 1; *Wheeler Shipyard v. Loice*, 13 F. Supp. 863, *affd.* 82 F. (2d)

We conclude that the inquiry into the crew-membership status is not jurisdictional in character, and, therefore, is one for the commissioner to determine, and his determination if supported by the evidence may not be disturbed by the District Court.

The following reasons underlie our conclusion:

(1) The Supreme Court has held that *two* factors are jurisdictional (navigable waters, and employer-employee relation) because without their presence the Federal Government would have no power to act. The naming of the *two* jurisdictional prerequisites impliedly excludes the existence of others.

(2) Although being a "member of a crew" *excepts* one from the purview of the *coverage* section (Section 3, above-quoted) the Supreme Court has held that another exception from coverage, namely, suicide, is *not* a jurisdictional issue. These two statutory exceptions, namely, a "member of a crew" and a death by suicide, are of identical structure in the statutory set-up of this section, and a legal construction given to the latter (suicide) might with plausibility be given to the former. If one is not a jurisdictional question, should we not give a like effect or construction to the other?

(3) The statute should be construed liberally to protect laborers.***

1022; *Hoage v. Royal Indemnity Co.*, 90 F. (2d) 387, cer. den.; *Speaks v. Hoage*, 78 F. (2d) 208; cer. den. 296 U. S. 574; *Malone v. Hoage*, 73 F. (2d) 855; *Wood Towing Co. v. Parker*, 76 F. (2d) 770; *Emp. Liability Corp. v. Hoage*, 91 F. (2d) 318; *McNelly v. Sheppard*, 89 F. (2d) 956; *Taylor v. McManigal*, 89 F. (2d) 583; *W. J. McCahan Sugar Co. v. Norton*, 43 F. (2d) 505, cer. den. 282 U. S. 899; *Keycay Stevedoring Co. v. Clark*, 43 F. (2d) 983; *Bethlehem Shipbuilding Co. v. Monahan*, *Texas Employers Ins. Assn. v. Sheppard*, 62 F. (2d) 122; *Wilson & Co. v. Lock*, 50 F. (2d) 81; *Mich. Transit Corp. v. Brown*, 56 F. (2d) 200; *Ind. Pier Co. v. Norton*, 54 F. (2d) 734; *Wheeling Corrug. Co. v. McManigal*, 41 F. (2d) 593; *Todd Dry Docks v. Marshall*, 61 F. (2d) 671; *Lumber Mut. Cas. Co. v. Locke*, 60 F. (2d) 35; *Pacific Emp. Ins. Co. v. Pillsbury*, 61 F. (2d) 101; *Green v. Crowell*, 69 F. (2d) 762; *West Penn Sand Co. v. Norton*, 95 F. (2d) 498; *DiGiorgio Fruit Corp. v. Norton*, 93 F. (2d) 119, cer. den. 302 U. S. 767; *Fulton v. Hoage*, 77 F. (2d) 110; *N. W. Stevedoring v. Marshall*, 41 F. (2d) 28.

*** *The Longshoremen's Act should be liberally construed: Crowell v. Benson*, 285 U. S. 22; *West Penn Sand & Gravel Co. v. Norton*, 95 F. (2d) 498; *Candado Stevedoring Co.*, 85 F. (2d) 119; CCA 2 cer. den. 299 U. S. 588; *Rothschild & Co. v. Marshall*, 44 F. (2d) 546; 56 F. (2d) 415; *DeWald v. H. & O. Co.*, 71 F. (2d) 810, CCA 4; cer. den. 293 U. S. 581; *Pac. Emp. Ins. Co. v. Pillsbury*, 61 F. (2d) 101; *Gen. Acc. Fire Corp. v. Crocell*, 76 F. (2d) 341; *Jarka Corp. v. Monahan*, 62 F. (2d) 212; *Eastern S. S. Lines v. Monahan*, 21 F. Supp. 535; *Bay Ridge Operating Co. v. Lowe*, 14 F. Supp. 280; *Fidelity & C. Co. v. Burris*, 59 F. (2d) 1042.

(4) The number of jurisdictional issues should not be increased beyond legal reason because the purpose of the Act was to expedite the hearing of claims and granting of awards and to simplify as greatly as possible the procedure in such matters, so that the needy, the helpless and the ignorant would receive financial aid promptly.**** The Act gives to the commissioner broad powers to accomplish this purpose.

There remains only the review of the deputy commissioner's finding that Schumann was not a member of a crew. The District Court found otherwise on a trial *de novo* on evidence similar to that heard by the commissioner.

The evidence, in our opinion, supports the commissioner's finding.†† The following facts are significant:

a) Schumann had no duties pertaining to the naviga-

**** *Crocell v. Benson*, 285 U. S. 22. "The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded. * * To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task."

†† CASES DISCUSSING THE NATURE OF THE DUTIES OF A MEMBER OF A CREW.

DeWald v. B. & O. R. Co., 71 F. (2d) 810, CCA 4, cer. den. 293 U. S. 581
Bargeman whose duties were to check and supervise loading and unloading of cargo and keeping record of loads, and who went home every night and who was sole worker on barges which were not navigated under their own power, held not member of crew so as to preclude recovery for his death; "crew" being a collective noun and signifying the ship's company.

He made lines fast, at dock and along side vessel.

He lived ashore and reported each day to see if needed.

Work averaged three days a week.

Barge operated only in harbor.

Not responsible for navigation, only incidental task of lines.

For certain purposes comes under category of seaman, but it doesn't follow he was a seaman in true sense—one who is engaged in voyages upon a ship or vessel and assists in the navigation of the vessel and is exposed to perils of sea, or, in other words, a seaman in the common acceptance of the term.

Significant Congress didn't use term "seaman."

The clause of the act excepting members of the crew, is one intended to restrict rather than extend and when we consider the purpose and history of the legislation as well as the nature of his duties and the use of the barges on which he was from time to time employed by the day, he was not a member of the crew.

tion of the vessel, except the incidental task of throwing the ship's line. His *primary* duty was to free the coal if it stuck in the hopper while being discharged into the fueled vessel, while both boats were at rest. He had no duties while the boat was in motion.

b) He was paid an hourly wage. He had no "Articles" (a naval term meaning employment contract) and none were necessary in this kind of work. He slept at home and boarded off ship. He was called very early in the morning each day as he was wanted. While he had worked only three weeks, and it might have been possible that he would have been retained for years to come, his employment was still more akin to temporary employment. The Captain testified that he was under no obligation to give him work each day—no contract of regular employment.

c) While we have given some weight to the fact that the Certificate of Inspection required the craft to have a

Warner v. Goltra, 293 U. S. 155, 158

"One can find a like range of variation in the use of the word 'crew.' It is sometimes used to comprehend the officers and common seaman, excluding the masters, and sometimes comprehending the common seamen only, excluding the master and officers."

Taylor v. McManigal, 89 F. (2d) 583 CCA

The deceased was killed while working as a mechanic. He had not assumed the duties of an assistant engineer. The most that can be said is that he with the other men working on the boat expected to become members of the crew when it was ready to sail. The commonly accepted meaning of the word "crew" is the whole company which mans a ship and aids in the navigation, or the ship's company.

Presumption is that in the absence of substantial evidence to the contrary the claim comes within the provision of the statute. The court held the preponderance was to the same effect. The court held deceased was fixing a boiler while ship was in dry dock and was not a member of the crew.

Seneca Washed Gravel Co. v. McManigal, 65 F. (2d) 779, CCA 2.

Night watchman on vessel in winter quarters held not member of crew. No part in navigation. Lived on shore. Never on boat when under way. Was watchman year around. Not shown in certificate of inspection that there was a night watchman in crew. Employment not for navigation purposes.

"The word 'crew' is used in the statute to connote a company of seamen belonging to the vessel, usually including the officers. It is the 'ship's company.' The crew is usually referred to and is naturally and primarily thought of as those who are on board and aiding in the navigation without reference to the nature of the arrangement under which they board."

Required no knowledge of shipping or navigation and could have been performed by anyone who had not been so instructed.

Union Oil Co. v. Pillsbury, 63 F. (2d) 925, CCA 9.

Third officer who was paid off and reengaged as night watchman while vessel was in dry dock held not member of crew because he was temporarily employed for the few days the ship was in dry dock (he occupied quarters on ship).

crew of five in addition to the master, and that in this instance five would be present only if Schumann were included, we are convinced that the word "crew" as used in the certificate has a different significance and connotation than the word "crew" as used in the statutory exception. The Longshoremen's Act contemplated the inclusion of that body of men who in the common parlance make up the ship's complement,—those who regularly or ordinarily are engaged in seafaring and navigation, not those whose tasks are of such a nature that they are independent of navigation in their scope, such as tasks which might as well have their background on shore, or at the dock (such as watchmen, etc.*****). The task of prodding coal down a runway might just as well have as its background a coal truck, a round house, or a mine, as a steamship. It was an ordinary laborer's job, and it was merely happenstance that the location of this position was on shipboard.

Even though the construction of this statute necessitated a different answer to the jurisdictional question, the result would be the same.

A District Court in reviewing the finding of the deputy commissioner, made in a proper case, is precluded from weighing the evidence. He may only inquire into the existence of any evidence to support a finding that the deceased was not a seaman. In such a case the District Court was required to examine the record and ascertain whether there was any evidence to support the commissioner's finding.

Likewise, on this review, assuming a trial *de novo* was proper and the seaman status presented a jurisdictional question, we must examine the evidence to ascertain whether there was any evidence to support the court's finding that he was a seaman.

In either case the facts are not in dispute. Therefore on undisputed evidence, is the finding, which we might call

***** Watchmen not within the Act. *Seneca Washed Gravel v. McManigal*, 65 F. (2d) 779, CCA 2; *Union Oil Co. v. Pillsbury*, 63 F. (2d) 925, CCA 9.

Cases wherein term "crew" under Longshoremen's Act is discussed. *DeWald v. B. & O. R. Co.*, 71 F. (2d) 810, CCA 4, cer. den. 293 U. S. 581; *Taylor v. McManigal*, 89 F. (2d) 583; *Seneca Washed Gravel Co. v. McManigal*, 65 F. (2d) 779, CCA 2; *Diomede v. Lowe*, 87 F. (2d) 296, CCA 2; *Lawson v. Md. Cas. Co.*, 94 F. (2d) 103; *Perry v. U. S. Emp. Comp. Com.*, 27 F. (2d) 144; *Union Oil Co. v. Pillsbury*, 63 F. (2d) 925; *Harper v. Parker*, 9 F. Supp. 744. See also *Warner v. Goltra*, 293 U. S. 155.

a conclusion that the deceased was a seaman, consistent with the undisputed facts!

Convinced as we are that the evidence establishes a non-seaman status, it follows that the court erred in holding to the contrary.

The decree is reversed with directions to vacate the injunction and dismiss the bill.

Endorsed: Filed May 11, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the eleventh day of May, 1939, the following further proceedings were had and entered of record, to-wit:

Thursday, May 11, 1939.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Hon. J. Earl Major, Circuit Judge.

Hon. Walter E. Treanor, Circuit Judge.

South Chicago Coal and Dock Company, an Illinois Corporation, and London Guarantee and Accident Company, Ltd.,

6808 · *vs.* Plaintiff-Appellees,

Harry W. Bassett, Deputy Commissioner of United States Employees Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On Consideration Whereof: It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to vacate the injunction and dismiss the bill.

And afterwards, to-wit: On the twenty-sixth day of May, 1939, there was filed in the office of the Clerk of this Court, a Petition for a Rehearing, which said Petition for a Rehearing is in the words and figures following, to-wit:

No. 6808

In the
UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

South Chicago Coal & Dock Company, An Illinois Corporation
and

London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,
vs.

Harry W. Bassett, Deputy Commissioner of United States Employees' Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable
Philip L. Sullivan,
District Judge.

PETITION FOR REHEARING.

Robert J. Folonie,
105 W. Adams Street,
Chicago, Illinois,
Counsel for Petitioners,
(Plaintiffs-Appellees).

Petition for Rehearing.

In the
UNITED STATES CIRCUIT COURT OF APPEALS.
For the Seventh Circuit.

No. 6808

South Chicago Coal & Dock Company, an Illinois Corporation and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,
vs.

Harry W. Bassett, Deputy Commissioner of United States Employees' Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable
Philip L. Sullivan,
District Judge.

PETITION FOR REHEARING.

Come now South Chicago Coal & Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd., plaintiffs-appellees, and respectfully pray that the above court may grant a rehearing herein and, upon the granting of such rehearing, may withdraw the opinion heretofore filed and vacate the order of reversal of decree and withdraw the order to vacate the injunction and vacate the order to dismiss the bill and, upon granting such rehearing, may affirm the judgment of the District Court; and petitioners, for cause and reason, present their argument hereinafter next appearing.

(The opinion filed is for convenience set forth in the appendix hereto.)

ARGUMENT.

I.

The court has overlooked an important and controlling section of the Statute.

The court has predicated its decision upon the premise that whether or not Schumann was a member of the crew of a vessel (*i. e.*, was not an employee as defined in the Act) is not a jurisdictional question. The court has discussed this problem as if it rested exclusively on *Section 3* of the Longshoremen's Act (33 U. S. C. A. § 903) (Op. p. 2).¹

The court has overlooked the fact that jurisdiction of persons under the Act is pursuant to definitions in *Section 2* of such Act (33 U. S. C. A. § 902). *Section 2* provides:

"The term 'employee' does not include a master or member of a crew of any vessel."

When, therefore, *Section 3* of the Act provides that compensation shall be payable for the "death of an employee," this language (read in the light of the definition in *Section 2*) necessarily means an employee who is not a master or member of a crew.

(*Section 2* was called to the attention of this court in Brief of Appellees, page 17.)

II.

The court has misconstrued and misapplied *Crowell v. Benson*, 285 U. S. 22.

The court having overlooked the controlling definition, in *Section 2*, which fixes jurisdiction of persons, has accordingly misconstrued the effect of the decision of the Supreme Court of the United States in *Crowell v. Benson*, 285 U. S. 22.

The opinion in the case at bar says (Op. p. 5):

"The Supreme Court has held that two factors are jurisdictional (navigable waters, and employer-employee relation) because without their presence the Federal Government would have no power to act. The naming of the two jurisdictional prerequisites impliedly excludes the existence of others."

We think the court has confused the discussion by the Supreme Court of the jurisdiction of Congress and the decision by the Supreme Court respecting jurisdiction of the deputy commissioner. The appellees here challenge the jurisdiction of the deputy commissioner and assert a trial *de novo* was properly to be had on the issue whether the deputy commissioner had jurisdiction—in other words, whether he was empowered to determine the controversy between the plaintiffs and the claimant.

The Supreme Court in *Crowell v. Benson*, 285 U. S. 22, decided that question (*i. e.*, the power to hear the matter *de novo* because the deputy commissioner had no jurisdiction under the statute) and said:

“The finality of such determinations of the deputy commissioner is predicated primarily upon the provision (§ 19 (a)) that he ‘shall have full power and authority to hear and determine all questions in respect of such claim.’ But ‘such claim’ is the claim for compensation under the Act and by its explicit provisions is that of an ‘employee,’ *as defined in the Act*, against his ‘employer.’” (P. 62.) (Italics are ours.)

When this court says in its opinion that a jurisdictional fact is “employer-employee relation,” this must necessarily mean, under the decision by the Supreme Court, not an issue whether or not the person in question is a general employee, but whether or not he is “an employee *as defined in the Act*.” If he is a member of the crew, he is not an employee (*as defined in the Act*) because the statute says in Section 2 that “the term ‘employee’ does not include a master or member of a crew of any vessel.” It is not disputed in the case at bar that the “Koal Kraft” was a vessel, nor even disputed that she was a vessel of the United States. It is undisputed that Schumann was one of the “crew” of that vessel without whose presence the ship could not operate and therefore he was not an “employee” *as defined in the Act* (*i. e.*, a person other than a member of the crew).

III.

The analogies drawn in the court’s opinion rest in error.

In the case at bar the court makes an analogy and says (Op. p. 5), that the asserted suicide of an employee (presumably one clearly within the Act) is not a jurisdictional

inquiry and may properly be compared with the inquiry here. The opinion herein says (p. 5):

"These two statutory exceptions, namely, 'a member of a crew' and a death by suicide, are of identical structure in the statutory set-up of this section, and a legal construction given to the latter (suicide) might with plausibility be given to the former. If one is not a jurisdictional question, should we not give a like effect or construction to the other?"

We think the court is clearly in error in this analogy, because under the statute two questions are fundamental or jurisdictional. As is said by the Supreme Court in *Crowell v. Benson*, 285 U. S. 22, l. c. 62, the fundamental or jurisdictional facts are: (1) locality of the injury (maritime location, *i. e.*, shipboard); and (2) the relation of the employer to the one injured as, "*an employee as defined in the Act.*" The claimed suicide of one who was confessedly a longshoreman would be the death of a person who concededly was *within the Act* who (it was claimed) committed some action which barred his recovery. The situation would not be unlike a defense which might be made at common law on the ground of a release. This is not a situation having analogy to the defense against compensation that the person for whose death compensation is sought was *not an employee within the definitions of the Act.* The court has been led into error by overlooking the provisions of Section 2 of the Longshoremen's Act.

IV.

The court has fallen into error in its emphasis on the duties performed by deceased (said to be ordinary labor) as a matter of importance.

A deckhand employed as a member of a crew of a vessel sailing on the seas or between States is a laborer. Although he is a necessary member of the crew, he is essentially a laborer and the common worker among the crew. That the terms "deck hand" on a sea-going vessel and "ordinary worker" means the same thing in substance appears uncontradictedly in the record (Tr. p. 51 in the evidence of the master).

"Q. What are the duties of a *seaman* on a vessel, a *sea-going vessel*?

A. There are ordinary and first class seamen. He would be an *ordinary seaman*.

Petition for Rehearing.

Q. What are the duties of an ordinary seaman?

A. To do deck work.

Q. Will you elaborate on your statement of deck work?

A. Yes, sir.

Q. Tell the court just what you mean by deck work.

A. By deck work, a deck hand is a man that does ordinary work. He handles the line, does odd jobs, painting and cleaning up the boat, keeps the boat in shipshape.

Q. Does the sea-going vessel have laborers?

A. Yes, sir. They call them ordinary seamen.

Q. I mean, do they have laborers also?

A. No, sir."

This court in its opinion says:

"The task of prodding coal down a runway might just as well have as its background a coal truck, a round house, or a mine, as a steamship. It was an ordinary laborer's job, and it was merely happenstance that the location of this position was on shipboard" (Op. p. 8.)

We believe that the court has fallen into error in this line of reasoning and we think the following analysis may be of aid to the court in coming to correct conclusions:

John Schumann was a *deck hand* and was shipped as such.

Webster's New International Dictionary defines a "*hand*" as "one employed at manual labor; as a factory hand; a member of a crew."

A *factory hand* is a manual laborer in a factory, and he is just as much a factory hand if he does strictly manual labor as if he does work involving some degree of skill.

A *farm hand* is a laborer working on a farm.

A *stable hand* is a laborer working about a stable, caring for horses.

A *deck hand* is a laborer working on the deck of a ship.

The *factory hand* is confronted with the perils of being caught in moving machinery in the factory.

The *farm hand* is confronted with the peril of being kicked by a horse.

A *hand in a mine* is confronted with the danger of a wall of coal falling on him and injuring or killing him.

A *deck hand* is confronted with the danger of *drowning*.

A longshoreman working on a dock in prodding coal on the dock is confronted with the danger of falling off the dock or being struck by the coal, but he does not have the constant danger of drowning as the deck hand does.

Schumann did not subject himself to the dangers of being kicked by a horse as the stable hand might, nor the fall of the roof of a mine as the miner would, but he was confronted with the peril of *drowning*,—the peril which, in fact, produced his death. His situation, as one of the crew of a vessel, was distinguished from all the other kinds of “hands” mentioned by the court, in that his work was performed *on the deck of a vessel*.

The chief difference between risks of a fireman on a steamship and a fireman in the power house of a factory is, that the fireman on shipboard is subjected to the danger of collision or drowning; in almost every other particular he has the same perils as the fireman on shore.

When the court says “it was merely happenstance that the location of this position was on shipboard,” the court has expressed the exact distinction between a longshoreman and a member of the crew, namely that a longshoreman (within the Act) performs his duties on land, or on docks and only incidentally on shipboard, and a member of the crew (as excluded from the Act) principally performs his duties on shipboard. If their laboring work be identical in every other particular, it is the location where their work is performed that makes one come within the Act and excludes the other from its operation.

V.

The court has overlooked important parts of the Brief of Appellees and cases there cited.

We respectfully call the attention of the court to the fact that this court has omitted any mention or review of the case of *Maryland Casualty Company v. Lawson*, 94 Fed. Rep. (2d) 190, decided by the Circuit Court of Appeals of the Fifth Circuit.

(This case is not to be confused with the case of *Lawson v. Maryland Casualty Co.* at page 193 of the same volume.)

The case is reviewed by us at some length at pages 25-27 of the Brief of Appellees. In that case the Court of Appeals, in a case indistinguishable from the one at bar in principle, and virtually identical upon the facts held “*The nature of the work done is not determinative*. Engineers and cooks as well as sailors are included” (p. 192) (Italics are ours). This court has in its opinion held to the contrary.

In that case the laborer on the scow (which had no pro-

pulsive power) did no work in any way different from that done by Schumann in the case at bar (p. 193). The court holds that the question was one of *jurisdiction* and that "the Deputy Commissioner was without jurisdiction" because the *laborer* on the scow, *properly styled a deck hand*, was *not an "employee" within the Act* and therefore the commissioner had no jurisdiction and recovery of compensation under the Act was not permitted. (The opinion in the case at bar is to the contrary.)

We respectfully submit that the case cited, as we read it, *squarely conflicts* with the opinion filed by this court. We assume that this court would not have failed to note or mention that case except through oversight.

We also call attention to the fact that in the case cited (at page 192) the test is said to be, not whether the person injured or deceased was an *employee* in the general employ of the owner of the vessel, but the question is there stated: "Was Burrows an *employee within the Act*, so that the Deputy Commissioner had jurisdiction?" This is a question on which his fact findings are not conclusive. *Crowell v. Benson*, 285 U. S. 22, 24." (Italics are ours.)

The opinion in the case at bar fails to give effect to the important words italicized above.

The court will find that in the case cited there was no dispute that Burrows was an employee of the shipowner in its general employment, but the question presented was whether he was "an employee within the Act," it being shown that he worked for the employer on the scow and worked only "*during their daily shift of eight hours*" (p. 193).

We call attention to the fact that it is not specifically prescribed by the Longshoremen's Act that the person injured who is excluded from its provisions must be "a seaman" but the Act says "members of the crew." Certainly the Act does not contemplate that every person who is "a member of the crew" must be one skilled in navigating a ship, for firemen, engineers and cooks, as well as sailors, are "members of the crew." The persons exempted from the Longshoremen's Act, over whom jurisdiction is not taken are "members of the crew," whether they are laborers (ordinary seamen), cooks, firemen, stewards, etc.

In the *Maryland Casualty* case the principal work of the scow man was dumping a scow at sea and cleaning her. As here, he was a mere deck hand. The fact that he was a "deck hand" or doing "laboring work" as part of his work as a member of the crew, does not affect his

status as a "member of the crew." If the opinion in the case at bar were to stand, it would require the conclusion (we think an erroneous conclusion) that a *fireman* on a vessel is not a member of the crew because he shovels coal, which he would also do if he were employed on land. The *engineer* is not a member of the crew because he operates an engine and his duties in running it are not different from those of an engineer running a stationary engine on shore.

The court has fallen into error in making the test that of *skill in seamanship*, which is not the test by which to determine whether one is a member of a crew.

We think the court has also failed to note the leading case decided by the Supreme Court of the United States (Appellees' Brief, p. 29) reported as *Ellis v. United States*, 206 U. S. 246, in which dredge hands were held to be seamen, and the fact that they operated a dredge for digging out a channel and did not participate in sailing a vessel was held to be of no importance. The important fact, as stated by the court in that case, was that the *work was performed on shipboard*, and the nature of the work there done was not controlling in determining whether they were seamen.

The court said:

"Whatever the nature of their work, it is incident to their employment on the dredges and scows, as in the case of an engineer or *coal shoveler* on board ship." (p. 260.) (Italics are ours.)

They were therefore held to be seamen and not longshoremen because they were "called upon for more or less of the *services required of ordinary seamen*." (p. 260.) (Italics are ours.)

We believe that the Supreme Court of the United States in the case so cited to this court has determined the matter to the contrary of this court's present opinion and this court has evidently overlooked the pertinency of that case.

VI.

The court's conclusion that the Act is to be liberally construed as to coverage is a misapprehension.

We think the court has also fallen into error in its conclusion that the "Longshoremen's Act should be liberally construed" (Op. p. 5). We believe that the cases cited by the court to this point are authority only for the statement that *when the statute is found to attach* and juris-

Petition for Rehearing.

dition for its application to exist, then it should be liberally construed to protect those whom it was designed to protect, namely, longshoremen. There is no question of liberal or strict construction to be applied in determining whether a person is within or without the Act, because that is a preliminary question which must be decided in ascertaining whether the Act applies at all. The statute does not permit of construction because it expressly provides that the employees who shall be subject to and entitled to the benefits and the detriments incident to the application of the Act shall be employees who are not members of the crew. As Schumann was without any dispute a member of the crew of the vessel, (regardless of his experience or lack of it as a sailor or seaman), compensation for his death is not within the scope of the Act, and the court has erred in holding to the contrary.

Upon all the foregoing considerations, we respectfully petition the court to grant a rehearing and upon the granting of such a rehearing, request that the court set aside its order of reversal and directions for dismissal of the bill, and affirm the judgment of the District Court.

Respectfully submitted,

Robert J. Folonie,

*Counsel for Petitioners,
(Plaintiffs-Appellees).*

Endorsed: Filed May 26, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fifth day of June, 1939, there was filed in the office of the Clerk of this Court, an Answer to Petition for Rehearing, which said Answer is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

No. 6808.

South Chicago Coal & Dock Company, an Illinois Corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,

vs.

Harry W. Bassett, Deputy Commissioner, United States Employees' Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

ANSWER TO PETITION FOR REHEARING.

William J. Campbell,
United States Attorney,
David H. Neuman,
Assistant United States Attorney,
Attorneys for Appellant.

Z. Lewis Dalby,
Chief Counsel, United States
Employees' Compensation Commission.

Chas. T. Branham,
Associate Counsel, United States
Employees' Compensation Commission.
Of Counsel.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

No. 6808.

South Chicago Coal & Dock Company, an Illinois Corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,

vs.

Harry W. Bassett, Deputy Commissioner, United States Employees' Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

ANSWER TO PETITION FOR REHEARING.

Now comes the appellant, Harry W. Bassett, Deputy Commissioner United States Employees' Compensation Commission, Tenth Compensation District, and respectfully prays that appellees' petition for rehearing be denied on the ground that appellees have failed to set forth any valid reasons for the granting of such relief.

I.

Under Point I of said petition counsel for appellees contends that this Court erred in holding that Schumann was not a "member of a crew" within the meaning of Section 3 (a) (1) of the Longshoremen's Act in that the Court "overlooked the fact that jurisdiction of persons under the Act is pursuant to definitions in Section 2 of such Act." It is submitted that the argu-

ment on this point is entirely frivolous. Under both the definitions in section 2 and under the coverage provisions of section 3 a "member of a crew of any vessel" is excluded from the Act. This Court properly held that, under the decision of the Supreme Court in *Crowell v. Benson*, 285 U. S. 22, any question with respect thereto was not fundamental or jurisdictional, and the mere fact that the Court in its opinion referred to certain coverage provisions of section 3 and not to the definitions in section 2 is of no importance. In fact, the Supreme Court predicated its opinion in the *Benson* case principally upon the coverage provisions of section 3 (See pages 37 and 38, note 1, and pages 47 and 55, note 1, of opinion in *Benson* case).

The relationship of employer and employee may exist notwithstanding that the employee is a "member of a crew," and it is only when there is an issue relating to the employer-employee relationship that the District Court is authorized to grant a trial *de novo*. The status of an employee as a "member of a crew" does not involve a question as to whether the relationship of *employer and employee* exists within the meaning of the opinion of the Supreme Court in the *Benson* case. The decision in the *Benson* case is not predicated upon the statutory definition of the term "employee" in section 2 (3), as counsel for appellees would apparently have this Court believe. As to the status of the employee, the opinion of the Supreme Court in the *Benson* case is predicated upon the proposition that a question or issue relating to the "*fact of employment*" is jurisdictional and authorizes the District Court to grant a trial *de novo*.

II.

Under Point II, page 3 of the petition, counsel for appellees contends that "The Court having overlooked the controlling definition, in section 2, which fixes jurisdiction of persons, has accordingly misconstrued the effect of the decision of the Supreme Court of the United States in *Crowell v. Benson*, 285 U. S. 22." The coverage provision of section 3 also "fixes jurisdiction of persons." The quotation from the *Benson* case on pages 3 and 4 of the petition is not complete. Following the last word "employer" therein the statement is made that "The *fact of employment* is an essential condition precedent to the right to make the claim," which shows

clearly that what the Supreme Court had in mind with respect to trial *de novo* or jurisdictional questions was the issue relating to the "fact of employment." No such issue was raised in the present case. There can be no question but that Schumann was in the *general employ* of the South Chicago Coal and Dock Company at the time of his death. Whether the employee was a "member of a crew" of the vessel on which he was working does not involve any question *as to the fact of employment*. In fact, it was conceded by appellees in their bill that the relationship of employer and employee existed between Schumann and the South Chicago Coal and Dock Company at the time of Schumann's death (R. 3). This Court therefore properly held on the basis of the decision in *Crowell v. Benson* that the District Court erred in granting the trial *de novo*.

III.

Under Point III, pages 4 and 5 of the petition, counsel for appellees finds fault with the very pertinent and logical observation of this Court in its opinion of May 11, 1939, as follows:

"Although being a 'member of a crew' *excepts* one from the purview of the *coverage* section (Section 3, above quoted) the Supreme Court has held that another exception from coverage, namely, suicide, is *not* a jurisdictional issue. These two statutory exceptions, namely, a 'member of a crew' and a death by suicide, are of identical structure in the statutory set-up of this section, and a legal construction given to the latter (suicide) might with plausibility be given to the former. If one is not a jurisdictional question, should we not give a like effect or construction to the other?"

It is stated on page 5 of the petition that in *Crowell v. Benson* the two questions regarded as fundamental or jurisdictional are "(1) locality of the injury (maritime location, *i. e.*, shipboard); and (2) the relation of the employer to the one injured as, 'an employee as defined in the Act'." It is submitted that this construction of the opinion of the Supreme Court in the *Benson* case is erroneous. With respect to the questions upon which a District Court may grant a trial *de novo*, the Supreme Court in the *Benson* case at pages 54 and 55 of its opinion specifically stated that "These fundamental

requirements are that the injury *occur upon the navigable waters* of the United States and that *relation of master and servant exist*. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (sec. 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions." In the present case neither of these issues was involved.

IV.

Under Point IV of the petition the argument is made that Schumann's "situation, as one of the crew of a vessel, was distinguished from all the other kinds of 'hands' mentioned by the court, in that his work was performed *on the deck of a vessel.*" This argument is so unconvincing that it appears to require no answer. No one can say that Schumann's duties were not those of an ordinary laborer, and the observation of the Court with respect thereto was germane and pertinent. Clearly there is no basis in the argument on this point for a rehearing.

V.

Under Point V, page 8 of the petition, it is contended that "this court has omitted any mention or review of the case of *Maryland Casualty Company v. Lawson*, 94 Fed. Rep. (2d) 190, decided by the Circuit Court of Appeals for the Fifth Circuit." It is submitted that the mere fact that the Court did not cite this case in its opinion is no basis for the contention that the court overlooked the case. The presumption is that the court considered all of the cases cited in the briefs of the respective parties.

The case of *Moore Drydock Company v. Pillsbury, Deputy Commissioner*, 100 Fed. (2d) 245, was reviewed at length on pages 15 to 18 of appellant's brief, but it was not mentioned by the court in its opinion. We do not contend, nor do we believe, however, that this Court failed to give careful consideration to that case as well.

The distinguishing features of the case of *Maryland Casualty Co. v. Lawson*, 94 Fed. (2d) 190, relied upon by appellees, were pointed out on pages 3 and 4 of appellant's reply brief, to which the attention of the Court is invited.

VI.

Under Point VI of the petition, it is contended that the Court's conclusion that the Act is to be liberally construed as to coverage is a misapprehension. The rule of liberality of construction is so universally recognized and applied in compensation cases, as is indicated by the numerous authorities cited on this point in the Court's opinion, that no answer to appellees' argument on this point appears to be necessary, except that it should be stated that in applying the rule of liberality of construction, the courts have made no distinction between cases involving jurisdictional and non-jurisdictional questions, as will be seen from an examination of the cases cited on this point by the Court.

For the foregoing reasons, it is respectfully submitted that appellees have failed to show any error by this Honorable Court in its opinion of May 11, 1939, and that the petition for rehearing should be denied.

Respectfully submitted,

William J. Campbell,
United States Attorney,

David H. Neuman,
Assistant United States Attorney,
Attorneys for Appellant.

Z. Lewis Dalby,
Chief Counsel, United States
Employees' Compensation Commission.

Chas. T. Branham,
Associate Counsel, United States
Employees' Compensation Commission.
Of Counsel.

Endorsed: Filed June 5, 1939. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the sixth day of June, 1939, the following further proceedings were had and entered of record, to-wit:

Tuesday, June 6, 1939.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

Hon. J. Earl Major, Circuit Judge.

Hon. Walter E. Treanor, Circuit Judge.

South Chicago Coal and Dock Company, *et al.*,

Plaintiffs-Appellees,

6808

vs.

Harry W. Bassett, Deputy Commissioner, etc.

Defendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the Petition for a Rehearing of this cause be, and the same is hereby denied.

And afterwards, to-wit: On the seventh day of June, 1939, there was filed in the office of the Clerk of this Court, a Motion to Stay Mandate, which said Motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

South Chicago Coal & Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,

vs.

Harry W. Bassett, Deputy Commissioner of the United States Employees' Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Number 6808.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

MOTION.

Now comes South Chicago Coal & Dock Company, an Illinois Corporation, and London Guarantee and Accident Company, Ltd., plaintiffs-appellees, and show to this court that they have heretofore filed with the Clerk of this court their petition in support of this their motion for a stay of the issuance of the mandate of this court in this cause.

Wherefore, these said plaintiffs-appellees pray that the mandate of this court be stayed and withheld pending the application for and the obtaining of a writ of certiorari from the Supreme Court of the United States, provided said application is made within the time fixed by law.

Robert J. Folonie,
Attorney for Plaintiffs-Appellees.

Dated 7th day of June, 1939.

Endorsed: Filed June 7, 1939. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the seventh day of June, 1939, there was filed in the office of the Clerk of this Court, a Petition to Stay Mandate, which said Petition is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

South Chicago Coal & Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,
vs.

Harry W. Bassett, Deputy Commissioner of the United States Employees' Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Number 6808.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION.

Now comes South Chicago Coal & Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd., plaintiffs-appellees, and present this their petition that the mandate of this court be stayed and withheld pending application for and obtaining of a writ of certiorari from the Supreme Court of the United States, and in support of said petition show that an opinion was filed in this cause on May 11, 1939 reversing the decree of the District Court with directions to vacate the injunction and dismiss the bill therein filed by these plaintiffs; that a petition for rehearing was filed by these plaintiffs-appellees on the 26th day of May, 1939; and that an order was entered by this court on the 6th day of June, 1939, denying said petition for rehearing; that the mandate of this court will be issued forthwith unless otherwise ordered by this court; that these plaintiffs-appellees, in good faith, intend to and will within the time prescribed by law present a petition and brief to the Supreme Court of the United States, praying that a writ of certiorari be issued therefrom to this court, and that these plaintiffs-appellees believe that they have reasonable and sufficient grounds for the application and obtaining of said writ of certiorari.

Wherefore, the petitioners pray that the issuance of the mandate of this court in this cause be stayed and withheld pending the application for and obtaining of a

writ of certiorari from the Supreme Court of the United States and until determination of said cause by the Supreme Court, provided said application is made within the time prescribed by law.

Respectfully submitted,

Robert J. Folonie,
Attorney for Petitioners (Plaintiffs-
Appellees).

Endorsed: Filed June 7, 1939. Frederick G. Campbell,
Clerk.

And afterwards, to-wit: On the tenth day of June, 1939, the following further proceedings were had and entered of record, to-wit:

June 10, 1939.

Court met pursuant to adjournment.

Before:

Hon. Evan A. Evans, Circuit Judge.

South Chicago Coal and Dock Company, et al.,

6808 *Plaintiffs-Appellees,*
vs.
Harry W. Bassett, Deputy Com-
missioner, etc.

Défendant-Appellant.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion and petition of counsel for appellees, It is ordered that the Mandate in this cause be, and it is hereby stayed until the further order of this Court, and that counsel for appellees promptly file a petition for a writ of certiorari in the Supreme Court of the United States, and forthwith file proof of the filing of said petition in this Court.

And afterwards, to-wit: On the eleventh day of July, 1939, there was filed in the office of the Clerk of this Court, a Notice and Proof of Service, which said Notice and Proof of Service is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

South Chicago Coal & Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,

vs.

Harry W. Bassett, Deputy Commissioner of the United States Employees' Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

Number 6808.

NOTICE AND PROOF OF SERVICE.

To: William J. Campbell, United States Attorney,
Attorney for Defendant-Appellant:

Please Take Notice that the South Chicago Coal & Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd., plaintiffs-appellees in the above cause will this 11th day of July, 1939, file in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, an assignment of errors or statement of points upon which they intend to rely on petition for and hearing on certiorari. A copy of the said assignment of errors or statement of points is herewith served upon you.

Robert J. Folonie,
Counsel for Plaintiffs-Appellees.

Received a copy of the above and foregoing Notice together with a copy of the assignment of errors or statement of points therein mentioned, this 11th day of July, 1939.

William J. Campbell P.J.
Attorney for Defendant-Appellant.

Endorsed: Filed July 11, 1939. Frederick G. Campbell,
Clerk.

And on the same day, to-wit: On the eleventh day of July, 1939, there was filed in the office of the Clerk of this Court, Assignment of Errors, etc., which said Assignment of Errors, etc., are in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

South Chicago Coal & Dock Company, an Illinois corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,

vs.

Harry W. Bassett, Deputy Commissioner of the United States Employees' Compensation Commission, Tenth Compensation District,

Defendant-Appellant.

} Number 6808.

ASSIGNMENT OF ERRORS OR STATEMENT OF POINTS UPON WHICH PLAINTIFFS-APPELLEES INTEND TO RELY.

The plaintiffs-appellees assign the following errors in the record and proceedings in this case and will rely on the following points on petition for and hearing on certiorari:

1. The said Circuit Court of Appeals erred in reversing the decree of the District Court.
2. The said Circuit Court of Appeals erred in not affirming the decree of the District Court.
3. The said Circuit Court of Appeals erred in directing the dismissal of the bill for injunction filed by these plaintiffs-appellees.
4. The said Circuit Court of Appeals erred in holding that the Deputy Commissioner had jurisdiction to make an award for the death of John Schumann.
5. The said Circuit Court of Appeals erred in holding that John Schumann was not a member of the crew of the "Koalkraft."
6. The said Circuit Court of Appeals erred in hold-

ing that the District Court was not entitled to hear the case *de novo*.

7. The said Circuit Court of Appeals erred in sustaining the contentions of the defendant-appellant respecting trial *de novo* in the District Court when no objection to such trial *de novo* was made therein.

8. The said Circuit Court of Appeals erred in holding that the crew-membership status of John Schumann was not jurisdictional in character.

9. The said Circuit Court of Appeals erred in holding that the crew-membership status of John Schumann was not a question of employer-employee relationship and therefore jurisdictional.

10. The said Circuit Court of Appeals erred in holding that the disputed question whether the deceased was a member of the crew, (even though he was in the general employment of the employer but was excluded, if a member of the crew, from those employees within the coverage of the Act as defined in paragraph 2 of the Longshoremen's and Harbor Workers' Compensation Act,) did not present a jurisdictional question of employer-employee relationship to be determined by the District Court.

Wherefore, on account of the errors hereinbefore set forth, plaintiffs-appellees will present their petition asking that a writ of certiorari issue from the Supreme Court of the United States to the said Circuit Court of Appeals, and upon the hearing of this cause before the Supreme Court of the United States will pray that the order of the United States Circuit Court of Appeals for the Seventh Circuit be reversed and the decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, be affirmed.

Robert J. Folonie,
Counsel for Plaintiffs-Appellees.

Endorsed: Filed July 11, 1939. Frederick G. Campbell, Clerk.

MICRO CARD

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TRADE

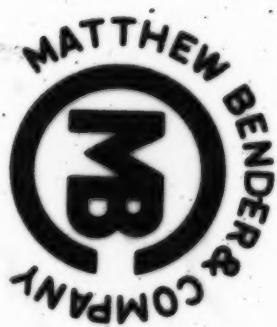
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UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages numbered from 81 to 115, inclusive, contain a true copy of the proceedings had and papers filed, (excepting stipulation as to printing Exhibit 1, and certified copy of Exhibit 1, which said stipulation and exhibit are reproduced in the printed record of this cause, certified herewith under a separate certificate, briefs of counsel, stipulation and order as to withdrawal of appellees brief, stipulation and order extending time for reply brief), in the case of

South Chicago Coal & Dock Company, an Illinois Corporation, and London Guarantee and Accident Company, Ltd.,

Plaintiffs-Appellees,

vs.

Harry W. Bassett, Deputy Commissioner of United States Employees Compensation Commission, Tenth Compensation District,

Defendant-Appellant,

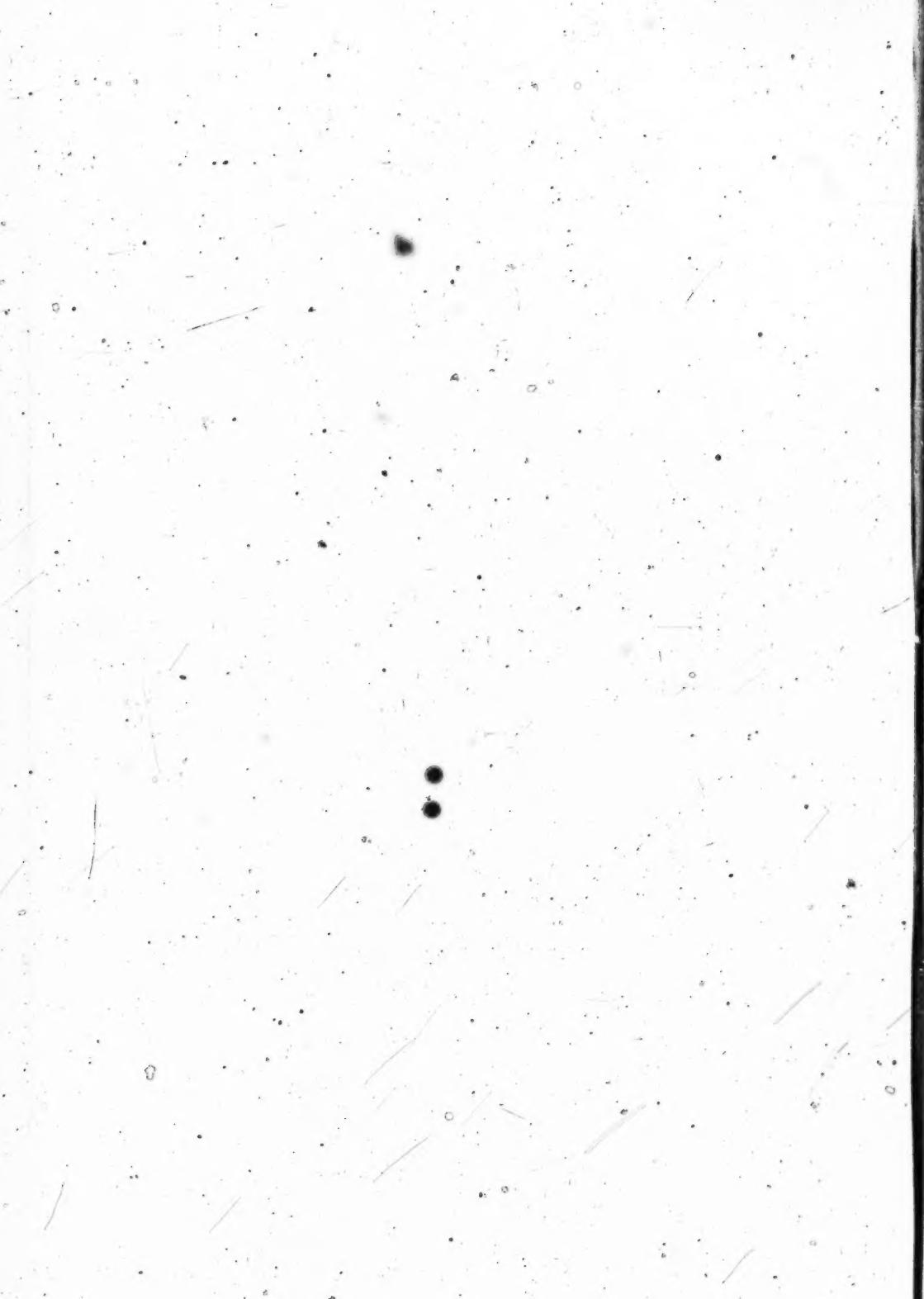
No. 6808, October Term, 1938, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 17th day of July A. D. 1939.

(Seal)

Frederick G. Campbell,

*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit;*



SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1939

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Butler took no part in the consideration and decision of this application.

(5174)

FILE COPY

U. S. Supreme Court U. S.
FILED
AUG 4 1939
CHARLES ELMORE OROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY, AN
ILLINOIS CORPORATION, AND LONDON GUARANTEE &
ACCIDENT COMPANY, LTD.,

Petitioners,

vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED
STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH
COMPENSATION DISTRICT,

Respondent.

PETITION OF SOUTH CHICAGO COAL & DOCK
COMPANY AND LONDON GUARANTEE & ACCI-
DENT COMPANY, LTD. FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND BRIEF IN
SUPPORT THEREOF.

ROBERT J. FOLONIE,
HAYES MCKINNEY,
Counsel for Petitioners.



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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1938.

No. _____

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD.,

Petitioners,

vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT.

Respondent.

PETITION OF SOUTH CHICAGO COAL & DOCK COMPANY AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD. FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, South Chicago Coal & Dock Company, an Illinois corporation, and London Guaranty & Accident Company, Ltd., respectfully pray the grant of a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, to review the judgment of that court entered May 11, 1939, rehearing overruled June 6, 1939; a transcript of

the record in the case, including the proceedings in said Circuit Court of Appeals is furnished herewith in accordance with the rules of this court.

Summary and Short Statement.

(1) The petitioners filed their bill of complaint in the United States District Court for the Northern District of Illinois, Eastern Division (under Sec. 21 Act of Mar. 4, 1927, Chap. 509, 44 Stat. 1436; p. 145 Pocket Suppl. Title 33 Sec. 921, U. S. C. A.), against the respondent for an injunction restraining the respondent, as Deputy Commissioner of United States Employees' Compensation Commission for the 10th Compensation District, from enforcing an order of compensation directing payments to be made to divers persons arising out of the death of John Schumann while a member of the crew as a deck hand of the vessel Koal Kraft upon the navigable waters of Calumet Harbor and River; to set aside such compensation order and for a finding that such compensation order should be held invalid upon the ground that said John Schumann, as a member of the crew of such vessel, was not within the compensation provisions of the Longshoremen's and Harbor Workers' Compensation Act.

(2) The facts of the situation showed that the vessel Koal Kraft was engaged in coaling other ships by receiving coal from the coal docks of the petitioner, South Chicago Coal & Dock Company, and transferring such coal by machinery to such other ships. (Tr. Dep. Com. p. 17—Dist. Ct. pp. 48, 57.) It was a fuel lightering business. (Tr. Dep. Com. p. 13—Dist. Ct. p. 48.) The Koal Kraft was 159 feet long, 37 feet 6 inches broad, had a draft of 10 feet or a little over, and was of 376 gross tons, 310 net tons. (Tr. Dep. Com. p. 14—Dist. Ct. pp. 47, 65.) The Koal Kraft was licensed to operate in waters between Illi-

inois and Indiana (Tr. p. 66) and operated in the Calumet River and Harbor and in the Indiana Harbor and River. (Tr. Dep. Com. p. 13—Dist. Ct. pp. 48, 66.) Its work was seasonal for about eight months of the year. (Tr. Dep. Com. p. 22.)

On October 31, 1937, when Schumann was lost off the vessel it was proceeding from its dock at 95th Street on the Calumet River (Tr. Dist. Ct. p. 53) to the steamer J. S. Ashley, moored at 103rd Street and the Calumet River. (Tr. Dist. Ct. p. 50.) The distance was in the neighborhood of a mile. (Tr. Dist. Ct. p. 53.) The course taken was thru and in a navigable stream. (Tr. Dist. Ct. p. 53.) On the day of Schumann's death he was on the ship when it left the coal dock at 95th Street. (Tr. Dep. Com. p. 37—Dist. Ct. pp. 50, 52, 55.) When the vessel reached 103rd Street, Schumann was missing. (Tr. Dist. Ct. p. 50.) The master of the ship next saw his body five days later after the coast guard had fished him out of the river at 95th Street. (Tr. Dist. Ct. p. 50.) He was then dead from drowning. (Tr. Dist Ct. p. 50.)

The Koal Kraft was inspected once a year by the steam-boat inspectors of the United States Government. (Tr. Dep. Com. p. 14.) The inspectors issued a certificate of inspection saying how many men were required to operate that vessel and the certificate called for a total crew of six men. (Tr. Dep. Com. p. 41.) The ship under its certificate was not allowed to work continuously more than twelve hours out of every twenty-four hours. (Tr. Dep. Com. p. 36—Dist. Ct. p. 65.) [NOTE: The requirements contained in the certificate were testified to in the hearing before the Deputy Commissioner. The certificate itself was produced at the trial in the District Court.] The certificate so produced contained among other things, the following applicable to the vessel in question:

"May be operated not to exceed 12 hours out of

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any 24 hours with 1 licensed master and pilot, 1 licensed chief engineer, 3 seamen, 1 fireman." (Tr. Dist. Ct. p. 65.)

The master of the Koal Kraft had held that particular job for twelve years. (Tr. Dep. Com. p. 14.) Men working on the ship stayed in their jobs pretty steadily. (Tr. Dep. Com. p. 19.) Schumann was called every time the rest of the crew were called during the time he was employed. (Tr. Dep. Com. p. 21.) There was one man, a fireman, who was there eleven years (Tr. Dep. Com. pp. 19, 21) and another man who had been on the ship five or six years. (Tr. Dep. Com. p. 19.) Kerston, who had held the job to which Schumann succeeded when Kersten was promoted to be fireman, had been working on the ship for five years. (Tr. Dep. Com. pp. 21-22.) All of the members of the crew working on the ship were hired by the master. (Tr. Dep. Com. p. 16—Dist. Ct. p. 51.)

On the day when Schumann was lost, there were five men on the boat besides the master, consisting of an engineer, a fireman, and three deck hands, one of whom was Schumann. (Tr. Dep. Com. p. 15—Dist. Ct. pp. 48-49.) Schumann began work on the ship October 5, 1937 and was lost October 31, having worked during the intervening period of twenty-six days. (Tr. Dep. Com. p. 18—Dist. Ct. pp. 49, 57.) The master had a license to operate a ship in these navigable waters. (Tr. Dep. Com. p. 41.) The engineer was required to have a license. (Tr. Dist. Ct. p. 57.) The fireman was not required to have a license. (Tr. Dist. Ct. p. 57.) Deck hands signed no papers. In operating a local boat in the harbor or rivers they do not sign articles. (Tr. Dep. Com. p. 18.) Crews of ships sailing the Great Lakes operating between different ports on different lakes (not confined to waters of adjoining states) do sign articles. (Tr. Dep. Com. p. 18.) (See law applicable, as set out in the brief in support of this petition.) Had

not Schumann or someone in his place been included in the crew as one of the three seamen required, the Koal Kraft might not lawfully have left the dock with coal for delivery to its customer's ship. (Tr. Dep. Com. pp. 41-42—Dist. Ct. p. 54.) There was never a time when the Koal Kraft operated with less than three deck hands or laborers on board. (Tr. Dist. Ct. p. 53.)

Schumann was hired and paid as a deck hand as a member of the crew of the Koal Kraft. (Tr. Dep. Com. p. 16.) He was doing labor work on the ship and was known as a deck hand. (Tr. Dep. Com. pp. 28-29, 34.) Such men are classified as seamen right away upon employment. (Tr. Dist. Ct. p. 51.) There are two classes of seamen on a vessel, ordinary and first class seamen (Tr. Dist. Ct. 50), and Schumann was an ordinary seaman employed to do deck work. Laborers on vessels are called ordinary seamen. Ships do not have laborers besides such ordinary seamen. (Tr. Dist. Ct. pp. 50-51.) The words seamen and deck hand are synonymous (Tr. Dist. Ct. p. 52), all deck hands are ordinary seamen. (Tr. Dist. Ct. p. 52.)

Schumann's work consisted in part of handling the ship's lines, both in mooring and in casting off. (Tr. Dep. Com. pp. 16, 17, 32—Dist. Ct. pp. 49, 55, 58.) Throwing a heaving line is an act of seamanship which the other men teach a new man. (Tr. Dep. Com. p. 21.) Schumann assisted the foreman in operating a steam winch thru which ran the mooring lines. (Tr. Dep. Com. pp. 17, 35—Dist. Ct. p. 57.) He scrubbed, painted and otherwise cleaned the deck and other parts of the vessel. (Tr. Dep. Com. pp. 18, 33, 35, 37-38, 40—Dist. Ct. pp. 51, 55, 58.) He also cleaned up the deck removing loose coal. (Tr. Dep. Com. p. 33—Dist. Ct. pp. 55, 58.)

One of Schumann's duties was to watch the conveyor mechanism, and with a long stick or prod help keep the

coal moving along the conveyor. (Tr. Dep. Com. pp. 20, 31, 35, 36, 38, 40—Dist. Ct. pp. 50, 52, 55, 56, 58.) The duties of a deck hand on a ship of this sort are just general labor, keeping it clean, handling the lines, painting or whatever he is asked to do. (Tr. Dep. Com. pp. 18, 27.) Schumann did no work except on the ship. (Tr. Dep. Com. pp. 21, 28.) Practically all Schumann's work was done on the ship. (Tr. Dist. Ct. p. 49.) He did no work on the dock with respect to handling coal. (Tr. Dist. Ct. p. 49.) When handling the lines of a ship it was done both on the ship and on the dock. (Tr. Dep. Com. pp. 16, 22—Dist. Ct. pp. 49, 55, 56, 58.)

In most cases the ship was in transit about forty-five minutes between the dock where it received its coal and the vessel which it coaled. (Tr. Dist. Ct. p. 56.) It took about twenty minutes to transfer the coal to the ship to which it was going, depending upon the amount of coal ordered. (Tr. Dist. Ct. p. 56.) Schumann had nothing to do while the ship was in transit until he reached the ship to be coaled (Tr. Dep. Com. pp. 21, 38—Dist. Ct. p. 53), except for emergency work in case of a breakdown. (Tr. Dep. Com. pp. 38, 39.) He was a part of the movement of the ship. (Tr. Dep. Com. p. 33.) The usual procedure on reaching the ship to be coaled was to tie up alongside first. (Tr. Dist. Ct. p. 57.) This would take about five minutes. (Tr. Dist. Ct. p. 57.)

Schumann was not furnished sleeping quarters on the vessel. (Tr. Dep. Com. p. 17—Dist. Ct. p. 49) nor was he furnished with food. (Tr. Dist. Ct. p. 49.) He lived in his own home. (Tr. Dep. Com. pp. 25-26.) He came on duty either upon call by telephone or at a time of which he was previously notified. (Tr. Dep. Com. pp. 20-21—Dist. Ct. p. 49.) This was the course with reference to all of the crew. (Tr. Dep. Com. p. 21—Dist. Ct. p. 49.) He

was paid only for the time he was actually engaged in work and was not paid while at home awaiting call. (Tr. Dist. Ct. p. 53.)

(3) The result of the hearing before the Deputy Commissioner was a finding that Schumann was not a member of the crew and was under the Compensation Act. (Tf. pp. 43-44.) On the trial of the case before the District Court, petitioners not only produced Exhibit B a transcript of the hearings had before the Deputy Commissioner (Tr. pp. 8-42), but also produced evidence to sustain their bill of complaint. (Tr. pp. 47-62.) The evidence of witnesses before the District Court was substantially the same as that before the Deputy Commissioner.

No objection was made by the attorneys for the claimant at the trial before the District Court that the case could be tried only upon the record made before the Deputy Commissioner.

The District Court held as a conclusion of law that the ship was permitted to operate not to exceed 12 hours out of any 24 with a crew consisting of the persons named in the certificate (Tr. p. 69); that the petitioner, South Chicago Coal & Dock Company, was not liable for compensation (Tr. p. 69) and that a member of a crew of a vessel is not, nor is the owner of such vessel, subject to the jurisdiction of the Deputy Commissioner justifying any award of compensation for the death of a deck hand, a member of the crew, and that no jurisdiction existed in the Deputy Commissioner to make any award of compensation for the death of Schumann. (Tr. p. 69.)

The District Court also made findings of fact, that Schumann came to his death by drowning in the Calumet River while working on the vessel in question (Tr. p. 70); that his drowning occurred by reason of being lost from that vessel while it was navigating the Calumet Harbor and

River, navigable waters of the United States (Tr. p. 70); that Schumann's duties were incident to fueling vessels, in which trade the vessel Koal Kraft was at that time engaged (Tr. p. 70); that at the time of Schumann's drowning, the Koal Kraft was being navigated in the Calumet River between 95th Street and the Calumet River, and another vessel, the Ashley, lying at 104th Street and the Calumet River (Tr. p. 70); that Schumann was lost from the Koal Kraft after it had passed 95th Street and before it reached the Ashley (Tr. p. 70); that Schumann at the time of being lost was a seaman employed as a deck hand (Tr. p. 70) and was a member of the crew (Tr. p. 71); that on the day in question the Koal Kraft was being operated in accordance with the limitations of its certificate, being then engaged in harbor navigation with a crew and ship's papers (Tr. p. 71); and that Schumann was not within the coverage of the Compensation Act. (Tr. p. 71.)

As a result of the conclusion of law and findings of fact the District Court made permanent and perpetual the preliminary injunction or injunctive order theretofore issued; decreed that payments already made to Schumann's widow should not be recovered but that petitioners should not be required to make further payments pending an appeal. The award of compensation was vacated and set aside and the defendants were permanently restrained and enjoined from attempting to enforce payments under the award. (Tr. p. 72.)

(4) The Circuit Court of Appeals for the Seventh Circuit reversed the decree of the District Court upon the following grounds:

That the status of Schumann as a seaman or as a long-shoreman was not a jurisdictional, fundamental fact entitling the District Court to consider and determine it but the finding of the Deputy Commissioner was binding upon the court; that a liberal construction of the Compensation

Act was proper not only as to matters relating to a claim but also as to the applicability of the Compensation Act;

That the exception contained in Section 3 with respect to non-applicability to a master or member of a crew stood in the same position as other provisions of Section 3 making compensation not payable because of drunkenness or suicide;

Gave no consideration to the provisions of Section 2 of the Compensation Act defining an employee; reviewed the evidence taken before the Deputy Commissioner and from that evidence reached the conclusion that the Deputy Commissioner's decision that Schumann was not a member of the crew and hence not excluded from the Act was a correct decision;

That the result of the case would be the same whether or not the District Court was entitled independently to pass upon the question of Schumann's being a member of the crew;

That even though a trial *de novo* was had the undisputed facts showed that Schumann had a non-seaman status; that the word "crew" as used in the certificate of inspection had a different meaning from the same word used in the statutory exception because of the purely incidental relation which the seaman's duties bore to navigation and the fact that his principal duties were those of an ordinary laborer who happened to be working on shipboard. (See Opinion of C. C. A., Tr. pp. 84-92.) This petition is presented August 4, 1939.

Jurisdiction.

Petitioners invoke jurisdiction under Section 240 of Judicial Code as amended, that is, under Act of February 13, 1925, Chapter 229, 43 Stat. 936-938, amending Section 240 of Judicial Code, and under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, Chapter 509, 44 Stat. 1424-1446, Sections 901-950, Title 33, pages

114-167, Pocket Supplement, and particularly under Section 21 of said Act, being Section 921 of said Title 33.

The judgment of the Circuit Court of Appeals for the Seventh Circuit sought to be reviewed was rendered on May 11, 1939, and a petition for rehearing was denied on June 6, 1939. This petition and brief are presented August 4, 1939.

Questions Presented on This Petition.

The questions presented upon this petition involve a construction of the Longshoremen's and Harbor Workers' Compensation Act and are as follows:

(1) Does the Compensation Act in question exclude from jurisdiction of the Deputy Commissioner power to make a compensation award, respecting an ordinary seaman or deck hand in working upon a vessel operating in navigable waters of the United States, and is by legal requirement and as a matter of fact a member of the crew, of such vessel?

(2) Is such question so fundamentally jurisdictional that the District Court may independently determine from the evidence whether such seaman or deck hand was a member of the crew and thus excluded from the provisions of the Compensation Act?

(3) Is applicability of the Compensation Act, which excludes members of a crew from the application of the Act, and determination of power of the Deputy Commissioner to make an award obtained by considering only Section 3(a) of the Act or should this question be measured also by Section 2 of said Act.

(4) Does a proper construction of the Compensation Act to determine jurisdiction of the Deputy Commissioner and the applicability of the Compensation Act require consideration not only of the fact that the deceased was an employee but also whether he was an employee of the kind and description covered by the provisions of the Act?

REASONS RELIED UPON FOR GRANTING THE WRIT.

The reasons for which these petitioners ask that a writ of certiorari be issued are as follows:

(1) The Circuit Court of Appeals for the Seventh Circuit failed to follow the decision of this court in *Crowell v. Benson*, 285 U. S. 22-95, 78 Law Ed. 598-637, and has decided this case in conflict with the applicable decision in that case in that the Circuit Court of Appeals has taken that decision of this court to mean that the only jurisdictional facts are (a) work being done upon navigable waters of the United States within the maritime jurisdiction of the United States, and (b) existence of an employer-employee relationship between the claimant and the employer. This is too limited because *Crowell v. Benson*, *supra*, decided as to the point (b) above referred to that not only must the employer-employee relationship exist but that *it must relate to an employee within its Act, that is, the nature of the employee's duties (i. e., that he is not a member of the crew of a vessel) must be such as to bring him within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.*

(2) The Circuit Court of Appeals for the Seventh Circuit has decided this case in conflict with the decision of this Court in *Ellis v. United States*, 206 U. S. 246, 51 Law. Ed. 1047, where a distinction was made between "mechanics and laborers" and all classes of seamen including deck hands.

(3) The Circuit Court of Appeals for the Seventh Circuit rendered its decision in conflict with the decision of another Circuit Court of Appeals on the same matter, that is to say, in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Maryland Casualty Company v. Lawson, Deputy Commissioner, et al.*, 94 Fed. (2d), 190.

(4) The Circuit Court of Appeals for the Seventh Circuit rendered its decision also in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit on the same matter in the case of *Kibadeaux v. Standard Dredging Company*, 81 Fed. (2d) 670 (afterwards affirmed by this court in *Standard Dredging Company v. Kibadeaux*, 299 U. S. 549).

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its Docket No. 6808, *South Chicago Coal & Dock Company and London Guarantee & Accident Company, Ltd. vs. Harry W. Bassett, Deputy Commissioner of United States Employees' Compensation Commission, 10th Compensation District*, and that the said judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

SOUTH CHICAGO COAL & DOCK COMPANY,
LONDON GUARANTEE & ACCIDENT COMPANY, LTD.,

By

ROBERT J. FOLONIE

Robert Folone

HAYES MCKINNEY

Counsel for Petitioners.

Hayes McKinney

BRIEF IN SUPPORT OF PETITION.**Jurisdiction.**

We have set out in our petition for allowance of the writ of certiorari the basis of jurisdiction of this court and refer to that portion of the petition and incorporate it herein without repetition.

Statement.

The foregoing petition contains a summary of the material facts and reference thereto is hereby made and such statement is incorporated herein. Such statement consists of a condensed narrative account of the facts of the situation with substantiating references to the pages of the transcript of the record.

Specifications of Error.

The Circuit Court of Appeals for the Seventh Circuit erred:

- (1) In reversing the decree of the District Court;
- (2) In not affirming the decree of the District Court;
- (3) In directing the dismissal of the bill for injunction filed by these petitioners;
- (4) In holding that the Deputy Commissioner had jurisdiction to make an award for the death of John Schumann;
- (5) In holding that John Schumann was not a member of the crew of the vessel Koal Kraft;
- (6) In holding that the District Court was not entitled to hear the case *de novo*;
- (7) In sustaining the contentions of the respondent, respecting trial *de novo* in the District Court, when no objection to such trial *de novo* was there made;

(8) In holding that the crew-membership status of Schumann was not jurisdictional in character;

(9) In holding that the crew-membership status of Schumann was not a jurisdictional question of employer-employee relationship under the Act.

(10) In holding that the disputed question whether Schumann was a member of the crew did not present a jurisdictional question of employer-employee relationship to be determined by the District Court.

Summary of Argument.

1. The Longshoremen's and Harbor Workers' Compensation Act applies only where (a) the claimant's work was within the maritime jurisdiction of the United States, (b) an employer-employee relationship, as defined and limited in the Act, existed between the claimant and the persons sought to be held. *Crowell v. Benson*, 285 U. S. 22.

2. The Longshoremen's and Harbor Workers' Compensation Act clearly excludes a member of the crew of a vessel from the operative effect of the Act.

44 Stat. 1424, Sec. 2. U. S. C. A. Pocket Supplement, Sec. 902(3) Ch. 33, p. 115.

3. Whether or not John Schumann was within the applicable provisions of the Compensation Act presented a question of law, which, together with the facts by which the question is resolved, are for the independent decision of the courts, and not finally determinable by administrative bodies.

Crowell v. Benson, 285 U. S. 22, l. c. 46, 62.

Maryland Casualty Co. v. Lawson, Deputy, etc., 94 Fed. (2d) 190.

4. In this case Schumann was a "member of the crew", that is, was an ordinary seaman integrated into the ship's complement by law and in fact.

The distinction between a "seaman" or "member of the crew" and an ordinary laborer ashore does not lie in the different nature, if any, of the work done but in the status of the seaman as forwarding the enterprise of the ship subject to control of the master, namely, such employee is a part of the ship's complement.

A sound hull, fit propulsive power and a crew as prescribed by law are all parts of a seaworthy ship.

Maryland Casualty Co. v. Lawson, Deputy, etc., 94 Fed. (2d) 190 (U. S. C. C. A. 5th Cir.).

Standard Dredging Co. v. Kibadeaux, 81 Fed. (2d) 670.

Ellis v. U. S., 206 U. S. 246, l. c. 260.

5. The respondent waived any question as to a trial *de novo* in the District Court.

3 Corpus Jur., p. 718, Sec. 618.

4 Corp. Jur., Secundum, p. 465, Sec. 241(a).

ARGUMENT.

I.

The Longshoremen's and Harbor Workers' Compensation Act applies only where:

- (a) the work being done by the claimant falls within the maritime jurisdiction of the United States;
- (b) the employer-employee relationship prescribed by the Act existed between the claimant and the persons sought to be held, namely, the claimant was an employee within definitions of the Compensation Act (i. e., a person other than member of the crew).

The leading and controlling case on this head is that of *Crowell v. Benson*, 285 U. S. 22-95, 78 L. Ed. 598-637, where this court very pointedly stated the distinction:

"Apart from cases involving constitutional rights

to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to employees *within the purview of the Act*, the findings of the Deputy Commissioner, supported by evidence and within the scope of his authority, shall be final." (p. 46.) (Italics ours.)

"The Congress has not expressly provided that the determinations by the Deputy Commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations by the Deputy Commissioner is predicated upon the provision (Section 19(a)) that he 'shall have full power and authority to hear and determine all questions in respect of such claim' but 'such claim' is the claim for compensation under the Act and by its explicit provisions is that of an 'employee', *as defined in the Act, against his employer*.'" (p. 62.) (Italics ours.)

The decision in *Crowell v. Benson* makes it a jurisdictional prerequisite to attachment of jurisdiction by the Deputy Commissioner that such worker was an employee of the persons sought to be held, but was also *an employee of the class included in the Compensation Act* as the Act defines that class, *i. e.*, maritime employees who are not members of the crew of a vessel.

II.

The Longshoremen's and Harbor Workers' Compensation Act embraces a limited class of employees engaged in work upon navigable waters of the United States within its maritime jurisdiction, and prescribes that masters of ships and members of the crew of vessels are excluded. (44 Stat. 1424.)

Section 2 of the Act, which contains definitions of the expressions used in the Act, is as follows:

Section 2, subsection 3:

"(3) The term 'employee' does not include a mas-

ter or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net." (Section 902(3), Chapter 33, page 116, Pocket Supplement, U. S. C. A.)

The foregoing provision sets forth conditions precedent which must be met before the Act is applicable to any case. Unless an "employee" is one responding to the definition of the foregoing subsection (3), the Act has no application even though the work, both of employer and employee, may relate to maritime employment upon navigable waters of the United States. This view of the situation was completely ignored by the Circuit Court of Appeals for the Seventh Circuit, which predicated its decision entirely upon Section 3 of the Act relating to coverage, which section for convenience is set out in full and is as follows:

"§ 903. Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, § 3, 44 Stat. 1426.)" (Section 903, Title 33, page 120, Pocket Supplement U. S. C. A.)

The language used in Sec. 3 (a) (1) is identical with that contained in Section 2 of Definitions. Here again, as with respect to Section 2, is found a *condition precedent*, namely

that the provisions for compensation shall not apply where the worker-claimant is a master of a ship or a member of the crew thereof. The question of applicability of the Act is a question of law, and while dependent upon a fact situation, namely, whether the claimant is the master of a vessel or is the member of the crew of a vessel, it still remains a question of law which must be decided by the courts.

The Circuit Court of Appeals in the case at bar, held that exclusion from the Act of "members of the crew" (Section 3, subsection a) is no more jurisdictional than suicide or drunkenness (Section 2, subsection b) in the presence of which one covered by the Act is barred from his compensation. The denial of compensation where the injury to a person within the Act was caused solely by drunkenness or suicide rests upon a *condition subsequent*, which relieves the *employer covered by the Act*, from liability to an *employee covered by the Act*, who by his own act of drunkenness or suicide, has deprived himself of the benefits of the Act.

In the case at bar the deceased was never under the Act. A *condition precedent* to jurisdiction of the Deputy Commissioner is therefore lacking.

III.

Whether the Compensation Act was applicable, that is, whether an employee is under the Act, is a legal question such as referred to in Section 21(b) ("if not in accordance with law") and in Section 18 ("is in accordance with law").

Such questions and all facts from which such questions are resolved are for the courts, not for administrative bodies.

These provisions were doubtless incorporated into the Act in order to be sure that lack of judicial review upon

questions of law should not invalidate. In *Crowell v. Benson, supra*, the following pertinent language is found:

"Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, *arising with respect to injuries to employees within the purview of the Act*, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task." (page 46.) (Italics ours.)

"The finality of such determinations of the deputy commissioner is predicated primarily upon the provision (Sec. 19 (a)) that he 'shall have full power and authority . . . in respect of such claim'. But 'such claim' is the claim for compensation *under the Act* and by its explicit provisions is that of an 'employee' as defined in the Act, against his 'employer'." (page 62.) (Italics ours.)

See also

Maryland Casualty Co. v. Lawson, Deputy, etc.,
94 Fed. (2d) 190 (C. C. A. 5th Cir.).

IV.

The facts here clearly show that Schumann was a "member of the crew", that is, was an "ordinary seaman" integrated into the ship's complement by law and in fact.

The Circuit Court of Appeals stressed the fact that Schumann did not live on the vessel, *that is*, did not sleep there, and ~~was~~ not furnished his meals and that honorable court laid emphasis that the deck hand performed in the main the work of a laborer.

Vessels engaged in harbor work are subject to the maritime jurisdiction relating to vessels operating on navigable waters of the United States. The laws of the United States recognize distinctions between vessels operating in harbors and those engaged in longer voyages:

(a) With respect to vessels navigating harbors and between adjoining states only, there is no requirement for shipping articles as required on vessels bound for foreign ports and from the Atlantic to the Pacific Ocean, or vice versa.

See R. S. Sec. 4511 (46 U. S. C. A. Sec. 564).

(b) Vessels in the coasting trade, though required to have shipping articles when bound from a port in one state to a port in another state specifically are exempt where the situation is that one of such ports is in "an adjoining state".

See R. S. Sec. 4520 (46 U. S. C. A. Sec. 574); *Thorson v. Peterson*, 9 Fed. 517.

In this case the vessel Koal Kraft was limited in its operations between Calumet Harbor and River in Illinois and the Indiana Harbor in the adjoining state of Indiana.

One engaged in work upon a harbor vessel is nevertheless a seaman and a member of the crew even though merely an ordinary seaman doing the most common and ordinary kind of laboring work.

Other requirements of United States law applicable to the Koal Kraft are those governing:

(a) Inspection;

See 48 Stat. 125, Chap. 61, Sec. 4399 (46 U. S. C. A. Sec. 361).

(b) Regulation of navigation;

See 34 Stat. 68, Chap. 955, Sec. 4400 (46 U. S. C. A. Sec. 362).

(c) Issuance of inspection certificates by such inspectors, in the absence of which vessels are not permitted to enter into navigation;

See 33 Stat. 1023, Chap. 145, Sec. 4417 (46 U. S. C. A. Sec. 391—Hull Inspection).

See also 48 Stat. 125, Chap. 61, Sec. 4418 (46 U. S. C. A. Sec. 392—Boiler Inspection).

See 38 Stat. 1216, Chap. 184, Sec. 4421 (46 U. S. C. A. Sec. 399).

(d) Designation of the complement of licensed officers and crew and certificates of inspectors. A vessel may not be navigated unless she complies with these directions.

See 40 Stat. 548, Chap. 72, Sec. 4463 (46 U. S. C. A. Sec. 222).

The rules and regulations of the Board of Supervising Inspectors for the Great Lakes have the force and effect of an Act of Congress.

See *Leathem Smith-Putnam Navigation Company, et al. v. National Union Fire Insurance Company, et al.*, 96 Fed. (2d) 923-927.

In the light of the foregoing requirements, the certificate which enabled the vessel Koal Kraft to operate upon the navigable waters of the United States becomes important, for the certificate in question required this particular vessel to have "1 licensed master and pilot, 1 licensed chief engineer, 3 seamen, 1 fireman." (Tr. p. 65.)

A "seaman" is a member of the crew of a vessel. See Sec. 713, Title 46 U. S. C. A.

Schumann was one of these required "seamen" within the meaning of the statute and of the certificate of the government inspectors, and thus essentially integrated into the crew as a member thereof to such an extent that had not he or someone in his place been employed on the

Koal Kraft it might not lawfully have left its dock. (Tr. pp. 41-42; 54.)

A case which seems to us conclusive upon the present question and which takes the view of *Crowell v. Benson*, 285 U. S. 22, is *Maryland Casualty Co., et al. v. Lawson, Deputy Commissioner*, 94 Fed. (2d) 190. (See comparatively case in the same volume at page 193, decided by the Circuit Court of Appeals for the Fifth Circuit.) It presents clearly a conflict with the decision in the present case and thus supports our contention that a writ of certiorari should be allowed.

In that case, Burrows, employee, worked as a deck hand, or common laborer, upon a scow which was loaded by a large seagoing dredge operating in the harbor of Miami, Florida. The scow when loaded was towed out to sea by a seagoing tug and there its contents were dumped into the sea. Burrows was lost from the scow and drowned while the scow was out at sea dumping its accumulation of harbor dredgings. The court says (page 192):

“A single question, common to both appeals, needs decision, to wit, *Was Burrows an employee within the act, so that the Deputy Commissioner had jurisdiction? This is a question on which his fact findings are not conclusive. Crowell v. Benson*, 285 U. S. 22, 24.” (Italics ours.)

Burrows was drowned while unloading a scow about three miles off the harbor at Miami.

The court further says (page 192):

“We attempt no definition of the crew of a vessel. Who are included was discussed recently, from different standpoints, in *DeWald v. B. & O. R. Co.*, 4 Cir. 71 F. 2d 810 and *Wandtke v. Anderson*, 9 Cir. 74 F. 2d 381. There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise and to protect her in emer-

gency, and a right to look to her and her earnings for wages. If she has a master, there is subjection to his commands. The nature of the work done is not determinative. Engineers and cooks as well as sailors are included. Longshoremen who load and unload a vessel under temporary local employment do not become members of the crew, nor do mechanics who similarly come aboard her to repair or clean or paint her; nor do those permanently employed upon her cease to be members of the crew because they are put at the same sort of work."

The court says the evidence is without contradiction that the dredge *Corozal*

" * * * was in command of a licensed master and was clearly a vessel with a crew within the meaning of the act, under our holding in *Kibadeaux v. Standard Dredging Co.*, 5 Cir., 81 F. 2d 670; *Standard Dredging Co. v. Kibadeaux*, 299 U. S. 549." (P. 192.)

Burrows worked on the scow. He was hired by the master of the dredge, on which he was fed and quartered. He signed no seaman's articles, and was not shown to be an experienced sailor.

" * * * But he and another were put aboard this scow, and remained there during their daily shifts of eight hours handling her lines, doing what was necessary to her navigation, and attending to dumping and cleaning her at sea.

While alongside the dredge and while aboard the dredge, they took orders from the master of the dredge. * * * He was employed under the title 'deckhand', and the evidence is that men at his work were always so called." (P. 193.)

The court held that:

" * * * The Deputy Commissioner was without jurisdiction. The judgments are reversed and the causes remanded, with directions to set aside his award." (P. 193.)

That Schumann was not a mere casual temporary employee was shown by the fact that although he had worked at this job only twenty-six days he was as much a part of

the entire enterprise of operating the ship Koal Kraft as the captain of twelve years experience with the ship or other workers who had taken part in its operation for long periods of time.

The differences in the facts of that case and those of the instant case are of no consequence. The scow on which Burrows was working did not operate under its own power, while the Koal Kraft did, but both were operating on the navigable waters of the United States, within the maritime jurisdiction. Burrows, it is true, was fed and quartered aboard the dredge which was used to load the scow upon which Burrows actually worked, but that was a mere difference in the terms of compensation under the employment contract.

See also *Kibadeaux v. Standard Dredging Co.*, 81 Fed. (2d) 670 (affirmed by Supreme Court of United States, *Standard Dredging Co. v. Kibadeaux*, 299 U. S. 549). The opinion is by the Circuit Court of Appeals, Fifth Circuit—Feb. 3, 1936. The facts in that case (see p. 673) do not differ in any important particular from those in the case at bar. It involved a harbor vessel without motive power.

In that case the deceased deck hand worked eight hour shifts, but at his option could go ashore after working hours to spend the night.

In the case cited Kibadeaux was "employed as a deck hand, with duties as a general helper."

The court held Kibadeaux was a seaman, and stresses the fact that he was the type of person who would have a maritime lien for his wages (p. 674).

The court, quoting from *Ellis v. United States*, 206 U. S. 246, says that all dredge hands are seamen within the

definition of an earlier statute of the United States, because they are "called upon for more or less of the services required of ordinary seamen" (p. 260). The fact that the work is all performed on board ship is of importance, and the court says:

"Whatever the nature of their work, it is incident to their employment on the dredges and scows, as in the case of an engineer or coal shoveler on board ship." (P. 260.)

A libel to recover damages independent of the Longshoremen's Act is sustained, on the ground that the Longshoremen's Act does not apply.

The decision of the Circuit Court of Appeals in this case was predicated largely upon the fact that the work being done by Schumann was in the main unskilled laborer's work on shipboard. The controlling test is not to the nature of the work but the test is whether or not the injured person was a part of the ship's complement. The work he happens to perform is incidental to his position as one of the essential ingredients of a seaworthy ship.

Ellis v. U. S., 206 U. S. 246, l. c. 260.

V.

The respondent waived any question as to a trial *de novo* in the District Court.

This case came on for trial in the District Court upon the petitioners' bill for an injunction filed pursuant to Section 21 of the Compensation Act, and the petitioners as plaintiffs and moving parties in the cause proceeded in regular course to produce evidence in support of their bill of complaint. No objection to the trial *de novo* was made in the District Court. Accordingly, all questions as

to the propriety of a trial *de novo* in the District Court were waived by the respondent.

See 3 Corp. Jur. p. 718, Sec. 618.

See also 4 Corp. Jur. Secundum, p. 465, Sec. 241(a).

The principal difference between the evidence before the Deputy Commissioner and that before the District Court consisted of the production before the court (Tr. pp. 65-68) of the certificate of inspection fixing the personnel of the operating crew of the Koal Kraft whereas before the Deputy its substance was testified to. (Tr. p. 36.) The evidence as to inspection was produced under a specific written stipulation that the certificate in question was a part of the evidence heard by the District Court. (Tr. pp. 77-78.)

The District Court made specific findings of fact (Tr. pp. 70-71) and conclusions of law (Tr. p. 68) which were ignored by the Court of Appeals upon the apparent premise that the District Court was concluded by the findings of the Deputy as to the facts and that the finding of the Deputy that Schumann was not a member of the crew precluded any inquiry into the fact and involved no question of law.

Conclusion.

From the foregoing analysis of the facts and of the law applicable thereto, we respectfully urge that the petition for certiorari should be allowed, so that when allowed the judgment of the Circuit Court of Appeals for the Seventh Circuit may be reversed and the judgment of the District Court for the Northern District of Illinois may be affirmed.

Respectfully submitted,

ROBERT J. FOLONIE,
HAYES MCKINNEY,
Counsel for Petitioners.

STATE OF ILLINOIS, } ss.
COUNTY OF COOK.

HAYES McKINNEY, being duly sworn, deposes and says that this petition for a writ of certiorari is presented in good faith, that he believes it to be sound in law and in fact, and that it is not presented for the purposes of delay.

Hayes McKinney

Subscribed and sworn to before me this 2nd day of August, 1939.

William Green

Notary Public.

My commission expires

April 16, 1943

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD.,

Petitioners,
vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT,

Respondent.

CERTIFICATE TO CIRCUIT COURT OF APPEALS 7th CIRCUIT

BRIEF FOR PETITIONERS.

ROBERT J. FOLONIE,
HAYES MCKINNEY,

Counsel for Petitioners.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD.,

Petitioners,

vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT,

Respondent.

CERTIORARI TO CIRCUIT COURT OF APPEALS 7th CIRCUIT

BRIEF FOR PETITIONERS.

**OFFICIAL REPORT OF OPINIONS DELIVERED
IN COURTS BELOW.**

There is no reported opinion of the District Court. The opinion rendered by the Circuit Court of Appeals for the Seventh Circuit is reported—

*South Chicago Coal & Dock Co. et al., appellees,
v. Bassett, Deputy Commissioner, appellant
(C. C. A.) 104 F. (2d) 522 (June, 1939) (copy
of opinion in record (R. 84-92)).*

Jurisdictional Grounds.

The respondent awarded compensation against petitioners (employer and insurance carrier) because of the death of John Schumann, a deck hand on a vessel.

The compensation award made by the Deputy Commissioner purports to be founded on powers under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, ch. 509, 44 Stat. 1424-1446, 33 U. S. C. A. ch. 18, Secs. 901-950 Pocket Suppl.

(See Appendix, p. 59.)

Jurisdiction of Federal Courts to review such compensations orders and enjoin them is given by Sec. 21 of such Act, 44 Stat. 1436; 33 U. S. C. A. ch. 18, Sec. 921 Pocket Suppl.

(See Appendix, p. 61.)

Jurisdiction of this court on certiorari is given by Act of Mar. 3, 1891, ch. 517, Sec. 6, 26 Stat. 828; Mar. 3, 1911, ch. 231, Sec. 240, 36 Stat. 1157; Feb. 13, 1925, ch. 229, Sec. 1, 43 Stat. 938, 28 U. S. C. A. Sec. 347.

The judgment of the Circuit Court of Appeals for the Seventh Circuit sought to be reviewed was rendered on May 11, 1939 (R. 92), a petition for rehearing was filed (R. 93) and was denied on June 6, 1939 (R. 109). The petition for certiorari and brief were presented August 4, 1939, and certiorari granted October 9, 1939.

A case under which this court took jurisdiction to review a case under Longshoremen's and Harbor Workers' Compensation Act, is

Crowell v. Benson, 285 U. S. 22.

STATEMENT OF THE CASE.

Suit was filed by petitioners in the District Court of the United States for the Northern District of Illinois asking for a permanent injunction, and that a compensation order made by the respondent in his capacity as Deputy Commissioner, asserted by him to be pursuant to the Longshoremen's and Harbor Workers' Compensation Act, might be set aside, and his findings be set aside. The award was because of the death of a deck hand, John Schumann. It was found by the Deputy Commissioner that the deceased, John Schumann, and the petitioner were persons comprehended within the terms of said Act as employer and employee under the terms of such Act and compensation was awarded (Award R. 44). The District Court by perpetual injunction, upon final hearing, set aside the award (Decree R. 71-2). The Circuit Court of Appeals reversed such decree (R. 92) and denied a rehearing (R. 109).

The petitioner, South Chicago Coal & Dock Company, was alleged in the Bill of Injunction to have been the operator of the described steam vessel the Koal Kraft; and the other petitioner, the insurance carrier.

The bill alleged the character of the vessel in question, which was 312 net tons, and approximately 159 feet in length, 37 feet beam, and 10 feet draft. The Koal Kraft was engaged in fueling vessels and Schumann was employed on it as a deck hand at the time of his death (R. 3).

It is alleged that Schumann came to his death on October 31, 1937, by drowning in the Calumet River, while employed on the vessel as a deck hand and that he was

one of the crew of said vessel, consisting of five persons. The vessel operated in Calumet River and Calumet Harbor and Indiana Harbor, and confined its operations within the navigable waters of the United States, in the states of Indiana and Illinois (R. 3).

Attached to the bill and made a part of it were the claim for compensation (Ex. A, R. 6); the transcript of the evidence produced before the Commissioner (Ex. B, R. 8); the order and award for compensation (Ex. C, R. 43).

The answer filed by the defendant raises only one ultimate issue, and that is, a denial that John Schumann was a member of the crew of a vessel. The answer says to the contrary he was a laborer on the barge Koal Kraft (R. 46).

It is alleged in the answer that Schumann signed no ship's articles; no living quarters were provided for him; and that while the vessel was discharging coal, his duty was to keep the coal running in the hoppers up on deck with a pole; that he had no duties to perform while the vessel was in motion; and the answer denies that he was outside of the compensation provisions of the Longshoremen's and Harbor Workers' Compensation Act, and asserts jurisdiction existed in the Commissioner (R. 46).

On the *de novo* hearing in the District Court the petitioners produced oral evidence of the master of the vessel, Arthur J. Spotton (R. 47), and Raymond Kersten a fireman from the vessel (R. 54). All the exhibits attached to the bill of complaint (proceedings before Deputy Commissioner) were admitted in evidence by agreement, and there was a stipulation that the allegations of the bill as to the answer filed before the Commissioner are correctly recited (R. 60).

All the evidence was preserved in a stenographic report of the testimony taken (R. 47 *et seq.*)

By stipulation, and on motion of the respondent, all the proceedings before the Deputy Commissioner were considered and stipulated as being in evidence (R. 60) and there was produced in court, in addition to the foregoing, the Certificate of Inspection by the Steamboat Inspectors, prescribing a crew for the vessel, styled "Plaintiffs' Exhibit 1" (R. 65). This was offered in evidence (R. 48) together with evidence that regulations of Vessel Inspectors establish the makeup of an essential crew (R. 58-59).

Except for the formal introduction of the Certificate of Inspection which had not been formally offered before the Commissioner, although its contents were recited (R. 41-42) and which was offered in evidence at the trial before the court (R. 48) and received in evidence, the evidence before the Deputy Commissioner and that produced before the court was substantially the same (R. 59).

The evidence which is uncontradicted and was produced before the Deputy Commissioner and before the court is as follows:

The proven facts are that the vessel Koal Kraft was a duly licensed vessel of the United States (R. 61). She was operated pursuant to a certificate prescribing her crew (R. 65). The Koal Kraft engaged in coaling other ships by receiving coal from the coal docks of the petitioner, South Chicago Coal & Dock Company, and transferring such coal by machinery to such other ships. (Dep. Com. R. 17—Dist. Ct. R. 48, 57.) It was a fuel lightering business. (Dep. Com. R. 13—Dist. Ct. R. 48.) The Koal Kraft was 159 feet long, 37 feet 6 inches broad, had a draft of 10 feet or a little over, and was of 376 gross tons,

310, net tons. (Dep. Com. R. 14—Dist. Ct. R. 47, 65.) The Koal Kraft was licensed to operate in waters between Illinois and Indiana (R. 66) and operated in the Calumet River and Harbor and in the Indiana Harbor and River. (Dep. Com. R. 13—Dist. Ct. R. 48, 66.) Its work was seasonal for about eight months of the year. (Dep. Com. R. 22.)

On October 31, 1937, when Schumann was lost off the vessel it was proceeding from its dock at 95th Street on the Calumet River (Dist. Ct. R. 53) to the steamer J. S. Ashley, moored at 103rd Street and the Calumet River. (Dist. Ct. R. 50.) The distance was in the neighborhood of a mile. (Dist. Ct. R. 53.) The course taken was thru and in a navigable stream. (Dist. Ct. R. 53.) On the day of Schumann's death he was on the ship when it left the coal dock at 95th Street. (Dep. Com. R. 37—Dist. Ct. R. 50, 52, 55.) When the vessel reached 103rd Street, Schumann was missing. (Dist. Ct. R. 50.) The master of the ship next saw his body five days later after the coast guard had fished him out of the river at 95th Street. (Dist. Ct. R. 50.) He was then dead from drowning. (Dist. Ct. R. 50.)

The Koal Kraft was inspected annually by the steam-boat inspectors of the United States Government. (Dep. Com. R. 14.) The inspectors issued a certificate of inspection prescribing how many men were required to operate that vessel and the certificate called for a total crew of six men. (Dep. Com. R. 41.) The ship under its certificate was not allowed to work continuously more than twelve hours out of every twenty-four hours with such prescribed crew. (Dep. Com. R. 36—Dist. Ct. R. 65.) [NOTE: The requirements contained in the certificate were testified to in the hearing before the Deputy Commissioner (R. 41-42). The certificate itself was produced at the trial in the Dis-

trict Court (R. 65, 48.)] The certificate so produced contained among other things, the following applicable to the vessel in question:

"May be operated not to exceed 12 hours out of any 24 hours with 1 licensed master and pilot, 1 licensed chief engineer, 3 seamen, 1 fireman." (Dist. Ct. R. 65, 48.)

The master of the Koal Kraft had held that particular job for twelve years. (Dep. Com. R. 14.) Men working on the ship stayed in their jobs pretty steadily. (Dep. Com. R. 19.) Schumann was called every time the rest of the crew were called during the time he was employed. (Dep. Com. R. 21.) There was one man, a fireman, who was there eleven years (Dep. Com. R. 19, 21) and another man who had been on the ship five or six years. (Dep. Com. R. 19.) Kersten, who had held the job to which Schumann succeeded when Kersten was promoted to be fireman, had been working on the ship for five years. (Dep. Com. R. 21-22.) All of the members of the crew working on the ship were hired by the master. (Dep. Com. R. 16—Dist. Ct. R. 51.)

On the day when Schumann was lost, there were five men on the boat besides the master, consisting of an engineer, a fireman, and three deck hands, one of whom was Schumann. (Dep. Com. R. 15—Dist. Ct. R. 48-49.) Schumann began work on the ship October 5, 1937 and was lost October 31, having worked during the intervening period of twenty-six days. (Dep. Com. R. 18—Dist. Ct. R. 49, 57.) The master had a license to operate a ship in these navigable waters. (Dep. Com. R. 41.) The engineer was required to have a license. (Dist. Ct. R. 57.) The fireman was not required by regulations to have a license. (Dist. Ct. R. 57). Deck hands signed no papers.

In operating a local boat in the harbor or rivers they do not sign articles. (Dep. Com. R. 18.) Crews of ships sailing the Great Lakes operating between different ports on different lakes (not confined to waters of adjoining states) do sign articles. (Dep. Com. R. 18.) (See law applicable, as hereinafter set out.) Had not Schumann or someone in his place been included in the crew as one of the three seamen required, the Koal Kraft might not lawfully have left the dock with coal for delivery to its customer's ship. (Dep. Com. R. 41-42—Dist. Ct. R. 54.) There was never a time when the Koal Kraft operated with less than three deck hands or laborers on board. (Dist. Ct. R. 53.)

Schumann was hired and paid as a deck hand as a member of the crew of the Koal Kraft. (Dep. Com. R. 16.) He was doing labor work on the ship and was known as a deck hand. (Dep. Com. R. 28-29, 34.) Such men are classified as seamen right away upon employment. (Dist. Ct. R. 51.) There are two classes of seamen on a vessel, ordinary and first class seamen (Dist. Ct. R. 50), and Schumann was an ordinary seaman employed to do deck work. Laborers on vessels are called ordinary seamen. Ships do not have laborers besides such ordinary seamen. (Dist. Ct. R. 50-51.) The words seamen and deck hand are synonymous (Dist. Ct. R. 52), all deck hands are called ordinary seamen. (Dist. Ct. R. 52.)

Schumann's work consisted in part of handling the ship's lines, both in mooring and in casting off. (Dep. Com. R. 16, 17, 32—Dist. Ct. R. 49, 55, 58.) Throwing a heaving line is an act of seamanship which the other men teach a new man. (Dep. Com. R. 21.) Schumann assisted the fireman in operating a steam winch thru which ran the mooring lines. (Dep. Com. R. 17, 35—Dist. Ct. R. 57.) He scrubbed, painted and otherwise cleaned the deck and

other parts of the vessel. (Dep. Com. R. 18, 33, 35, 37-38, 40—Dist. Ct. R. 51, 55, 58.) He also cleaned up the deck removing loose coal. (Dep. Com. R. 33—Dist. Ct. R. 55, 58.)

One of Schumann's duties was to watch the conveyor mechanism, and with a long stick or prod help keep the coal moving along the conveyor. (Dep. Com. R. 20, 31, 35, 36, 38, 40—Dist. Ct. R. 50, 52, 55, 56, 58.) The duties of a deck hand on a ship of this sort are just general labor, keeping it clean, handling the lines, painting or whatever he is asked to do. (Dep. Com. R. 18, 27.) Schumann did no work except on the ship. (Dep. Com. R. 21, 28.) Practically all Schumann's work was done on the ship. (Dist. Ct. R. 49.) He did no work on the dock with respect to handling coal. (Dist. Ct. R. 49.) When handling the lines of a ship it was done both on the ship and on the dock. (Dep. Com. R. 16, 22—Dist. Ct. R. 49, 55, 56, 58.)

In most cases the ship was in transit about forty-five minutes between the dock where it received its coal and the vessel which it coaled. (Dist. Ct. R. 56.) It took about twenty minutes to transfer the coal to the ship to which it was going, depending upon the amount of coal ordered. (Dist. Ct. R. 56.) Schumann had nothing to do while the ship was in transit until he reached the ship to be coaled (Dep. Com. R. 21, 38—Dist. Ct. R. 53), except for emergency work in case of a breakdown. (Dep. Com. R. 38, 39.) He was a part of the movement of the ship. (Dep. Com. R. 33.) The usual procedure on reaching the ship to be coaled was to tie up alongside first. (Dist. Ct. R. 57.) This would take about five minutes. (Dist. Ct. R. 57.)

Schumann was not furnished sleeping quarters on the vessel (Dep. Com. R. 17—Dist. Ct. R. 4) nor was he furnished with food. (Dist. Ct. R. 49.) He lived in his

own home. (Dep. Com. R. 25-26.) He came on duty either upon call by telephone or at a time of which he was previously notified. (Dep. Com. R. 20-21—Dist. Ct. R. 49.) This was the course with reference to all of the crew. (Dep. Com. R. 21—Dist. Ct. R. 49.) He was paid only for the time he was actually engaged in work and was not paid while at home awaiting call. (Dist. Ct. R. 53.)

The result of the hearing before the Deputy Commissioner was an award and a finding that Schumann was not a member of the crew and was under the Compensation Act. (R. 43-44.) On the trial of the case before the District Court, petitioners not only produced Exhibit B a transcript of the hearings had before the Deputy Commissioner (R. 8-42), but also produced witnesses and evidence to sustain their bill of complaint. (R. 45-62.) The evidence of witnesses before the District Court was substantially the same as that before the Deputy Commissioner.

No objection was made by the attorneys for the respondent at the trial before the District Court to production of evidence there that the case could be tried only upon the record made before the Deputy Commissioner. (R. 47 *et seq.*)

The District Court rendered conclusions of law three in number (R. 69), as follows:

1.

"Under the evidence herein, the court finds as a matter of law that the 'Koal Kraft' was required to have a crew of thirteen men, but was permitted to operate not to exceed twelve hours out of any twenty-four, with a crew of one licensed master and pilot, one licensed chief engineer, three seamen, and one fireman."

2.

"Plaintiff, South Chicago Coal & Dock Company, is not liable for the payment of any compensation under the 'Longshoremen's and Harbor Workers' Compensation Act' (44 Statutes, 1424; 33 USCA, Chap. 18), for the death of John Schumann."

3.

"Under the law, a member of the crew of a vessel is not, nor is the owner of such vessel, subject to the jurisdiction of the Commissioner or Deputy Commissioner under 'Longshoremen's and Harbor Workers' Compensation Act,' justifying any award of compensation for the death of a deck hand, a member of the crew, and no jurisdiction existed in the Deputy Commissioner to make any award of compensation for the death of John Schumann."

The court also made nine specific findings of fact (R. 70-71) that:

1.

"On October 31, 1937, John Schumann came to his death by drowning in the Calumet River while employed by the plaintiff, South Chicago Coal & Dock Company, on its vessel, the 'Koal Kraft.' "

2.

"The drowning of John Schumann occurred by reason of his being lost from the vessel, 'Koal Kraft,' while it was navigating the Calumet Harbor and River, navigable waters of the United States."

3.

"John Schumann, at the time of his being lost, was employed by the plaintiff, South Chicago Coal & Dock Company, as a deck hand on the vessel 'Koal Kraft,' and as such his duties consisted in making lines fast, loosing them, keeping the vessel clean, and various duties incident to fueling vessels, in which trade the said vessel was at that time engaged."

4.

"John Schumann, during his employment by the plaintiff, South Chicago Coal & Dock Company, performed the duties of a deck hand aboard the vessel 'Koal Kraft' and at the time of his being lost therefrom, the said vessel was being navigated in the Calumet River between the plaintiff's (South Chicago Coal & Dock Company) dock at 95th Street and the Calumet River, north of the 95th Street bridge in Cook County, Illinois, and the vessel 'Ashley,' then lying at 104th Street and the Calumet River in said Cook County, Illinois. John Schumann was lost from the 'Koal Kraft' after it had passed to the south of the 95th Street bridge and before it reached the 'Ashley.'"

5.

"John Schumann, at the time of his being lost from the 'Koal Kraft,' was a seaman employed thereon as a deck hand."

6.

"On October 31, 1937, the said vessel was being operated not to exceed 12 hours of that day, and the members of the crew, at the beginning of the voyage during which John Schumann was lost overboard,

were Arthur J. Spotton, Master; Harry Zivney, Engineer; John Schumann, Joe Kete and George Gornick, deck hands; and Raymond Kersten, Fireman."

7.

"John Schumann, at the time of his being lost from the vessel 'Koal Kraft,' was a member of the crew of that vessel. (Held)"

8.

"John Schumann, at the time of his coming to his death by drowning, was not within the coverage of the 'Longshoremen's and Harbor Workers' Compensation Act.' (44 Statutes 1424; 33 USCA Chap. 18.)"

9.

"The steamship 'Koal Kraft' was, at the time of the death of John Schumann, a vessel of the United States engaged in harbor navigation, with a crew and ship's papers."

Pursuant to the conclusions of law and findings of fact the District Court made permanent and perpetual the preliminary injunction or injunctive order theretofore issued; decreed that payments already made to Schumann's widow should not be recovered. The award of compensation was vacated and set aside and the defendant was permanently restrained and enjoined from attempting to enforce payments under the award. (R. 72.)

The Circuit Court of Appeals for the Seventh Circuit reversed the decree of the District Court upon the following grounds:

That the status of Schumann as a seaman or as a longshoreman was not a jurisdictional, fundamental fact en-

titling the District Court to consider and determine it but the finding of the Deputy Commissioner was binding upon the court; that a liberal construction of the Compensation Act was proper not only as to matters relating to a claim but also as to the applicability of the Compensation Act;

That the exception contained in Section 3 of the Act with respect to non-applicability to a master or member of a crew stood in the same position as other provisions of Section 3 making compensation not payable because of drunkenness or suicide;

That the result of the case would be the same whether or not the District Court was entitled independently to determine the question whether or not Schumann was a member of the crew;

That even upon the *de novo* evidence the undisputed facts established that Schumann had a non-seaman status; that the word "crew" as used in the certificate of inspection had a different meaning from the same word used in the statutory exception because of the purely incidental relation which the seaman's duties bore to navigation and the fact that his principal duties were those of an ordinary laborer who happened to be working on shipboard. (See Opinion of C. C. A., R. 84-92.)

The Circuit Court of Appeals gave no consideration to the provisions of Section 2 of the Compensation Act defining an employee; reviewed the evidence taken before the Deputy Commissioner and from that evidence reached the conclusion that the Deputy Commissioner's decision that Schumann was not a member of the crew and hence not excluded from the Act was a correct decision.

**Assigned Errors Relied Upon Herein
(R. 114-115).**

Petitioners specify that they rely upon assigned errors as follows (numbers refer to formal assignments of error as numbered) :

The Court of Appeals erred in reversing the decree of the District Court;

- (1) Instead of affirming it;
- (2) In dismissing the bill for injunction filed by plaintiffs;
- (3) In holding that the Deputy Commissioner had jurisdiction to make an award for the death of John Schumann;
- (4) In holding that he was not a member of the crew of the steamer Koal Kraft;
- (5) In holding that the District Court was not entitled to hear the case *de novo*;
- (6) In finding error in conduct of trial *de novo*, whereas no objection was made on the trial to the fact that the case was heard anew;
- (7) In holding that the crew-membership status of deceased was not jurisdictional in character;
- (8) In holding that such status was not a question of employer-employee relationship of a jurisdictional kind;
- (9) In holding that the question whether he was a member of the crew did not present a jurisdictional question of employer-employee relationship to be independently determined by the District Court on a review of an award under Longshoremen's and Harbor Workers' Compensation Act.

SUMMARY OF ARGUMENT.

I.

A Deputy Commissioner has no jurisdiction under Longshoremen's and Harbor Workers' Compensation Act to award compensation for death of a deck hand, employed by the master, and performing ordinary duties of a deck hand upon an enrolled vessel of the United States, operating in the waters of two adjacent States.

Under the definitions of the Act a member of the crew is not an "employee" within the powers of a Deputy Commissioner to make a compensation award.

(a) Any person who is one of a ship's company is a member of a crew.

United States v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740.

The Bound Brook, (D. C.) 146 F. 160.

The Marie (D. C.), 49 F. 286, 287.

The Buena Ventura, (D. C.) 243 F. 797.

In re Meyer, (D. C.) 74 F. 881.

Jones v. Shepherd Deputy Comm., 20 Fed. Supp. 345.

(b) The jurisdiction of the Deputy Commissioner rests in the status of employer and employee as defined in the Act. An "employee," as defined in the Act, is one who is neither a master nor a "member of a crew of a vessel." Respecting a master or member of a crew of a vessel, no jurisdiction or power exists in the Deputy Commissioner.

make an award of compensation for their injuries or death.

Sec's 1, 2, 3 Act March 4, 1927 Ch. 509, 44 Stat. 1424; 33 U. S. C. A. Chap. 18, Sec's 901-2-3, Pocket Supplement.

Crowell v. Benson, 285 U. S. 22, 49, 50, 63.

Interstate Commerce Commission v. Humboldt Steamship Company, 224 U. S. 474, 484.

Ellis v. United States, 206 U. S. 246.

Maryland Casualty Co. v. Lawson, Dep. Com'r., et al., 94 F. (2d) 190.

Lawson, Dep. Com'r., et al. v. Maryland Casualty Co., 94 F. (2d) 193.

Kibadeaux v. Standard Dredging Co., 81 F. (2d) 670.

(c) Shipping articles are not required by law nor employed respecting a vessel operating in the waters of a single State or of two adjoining States. A want of shipping articles in the case of employment of deceased has no significance.

Rev. St. 4520; 46 U. S. C. A. Ch. 18, Sec. 574.

Burdett v. Williams, 27 F. 113, 117.

Thorson v. Peterson, 9 F. 517.

The Lilly, 69 F. (2d) 898.

U. S. v. The Brig Grace Lothrop, 95 U. S. 527, 532.

The John Martin, Fed Cas. No. 7357, 13 Fed Cas. 694, 2 Abb. U. S. 172 (1870).

3 Kent's Commentaries 177, note (b).

(d) The steamer Koal Kraft was a licensed vessel in the United States subject to inspection, Certificate of Vessel Inspectors, and designation by them of complement and crew. She was a "vessel," as that term is used in the

Longshoremen's Act. The certificate of the inspectors has the force of law.

Leathem, Smith-Putnam Navigation Co., et al., v. National Union Fire Ins. Co., et al., 96 F. (2d) 923, 927.

II.

The statute gives a plenary right of review of an award "if not in accordance with law." Inferences contrary to undisputed facts may not be sustained.

The District Court did not commit reversible error in trying the issues *de novo*.

(a) Issue was made in the pleadings whether or not deceased Schumann was an employee under the Act.

Bill of Complaint, R. 3-4-9.

Answer, R. 46.

(b) No objection was made to the hearing *de novo* in the District Court.

R. 47-60.

(c) The evidence before the Deputy Commissioner and the evidence before the District Court were substantially the same.

R. 59 (Statement of respondent's counsel).

R. 84-89 (Opinion of C. C. A.).

Therefore the procedural question is not important.

Taylor v. McManigal, 80 F. 2nd 583 (C. C. A. 6th Cir.).

(d) The case having been tried by the parties in the trial court upon the theory of propriety of a trial *de novo*, an inconsistent assertion may not be made on appeal.

3 Corp. Jur. 718, Sec. 618.

4 Corp. Jur. Sec. 465, Sec. 241 (a).

(e) Trial *de novo* was the proper method of procedure.

Crowell v. Benson, 285 U. S. 22.

III.

Findings of fact and conclusions of law held by the District Court not challenged by assertion of error by respondent on appeal to the Circuit Court of Appeals stand as the conceded facts and law of the case.

Such uncontradicted and conceded findings of fact and conclusions of law require that the judgment of the Circuit Court of Appeals be reversed and the judgment of the District Court reinstated.

(See Argument.)

Crowell v. Benson, 285 U. S. 22.

IV.

The opinion of the Circuit Court of Appeals rests upon erroneous conclusions and declarations of law.

See Argument.

Crowell v. Benson, 285 U. S. 22, 47.

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ARGUMENT.**I.**

John Schumann was not an "employee" for the death of whom the Deputy Commissioner had jurisdiction to award compensation under the Longshoremen's and Harbor Workers' Compensation Act.

The Longshoremen's and Harbor Workers' Compensation Act (March 4, 1927, chap. 509, Secs. 1-50, 44 Stat. 1424-1446; 33 U. S. C. A. chap. 18, Secs. 901-950 Pocket Supplement) is a compensation act providing in Section 3 for compensation "in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States."

It further provides that:

"No compensation shall be payable in respect of the disability or death of—(1) a master or a member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net."

March 4, 1927, chap. 509, sec. 3, 44 Stat. 1426,
33 U. S. C. A. chap. 18, sec. 903.

By the immediately preceding Section 2 (Subsec. 3, under the caption "definitions") it is provided that:

"Definitions. When used in this chapter . . .
(3) "The term 'employee' does not include a master or member of a crew of any vessel, nor any person

engaged by the master to load or unload or repair any small vessel under 18 tons net."

March 4, 1927, Chap. 509, Sec. 2, 44 Stat. 1424,
33 U. S. C. A. chap. 18, sec. 902, subsec. 3.

The statute by its terms does not extend to every employee, but where the term "employee" is used in the Act, it is expressly defined in the Act by the statement that such term does *not* include a "member of a crew of any vessel."

The principal question involved on this review, and to which all other questions are largely subsidiary, is whether John Schumann was an employee within the Act and, therefore, whether the Deputy Commissioner had jurisdiction to award compensation for his death.

The statute itself contains a definition of an employee under the Act—for the sole power of the Deputy Commissioner in any case is to award compensation, and the only compensation, to award which he has jurisdiction, is defined in Sec. 2, paragraph 12 (Mar. 4, 1927, Chap. 509, Sec. 2, 44 Stat. 1424; 33 U. S. C. A. Sec. 902, par. 12), which provides a definition when used in the chapter, i.e.:

"(12) 'Compensation' means the money allowance payable to an employee or his dependents, as provided for in this chapter, and includes funeral benefits provided therein."

The only jurisdiction the Deputy Commissioner has to award compensation for a death, therefore, is "to an employee or to his dependents, *as provided for in this chapter*," and an "employee," as already stated, does not include "a member of a crew of any vessel."

These clear definitions of the jurisdiction of the Deputy Commissioner to make an award, leave little room for discussion. The respondent, however, made an award under undisputed facts showing that John Schumann was a member of the crew of the Steamer "Koal Kraft," and did so upon the grounds now urged by the United States Circuit Court of Appeals, that Schumann, having performed services such as, it was said, would be performed on the land by a laborer, was not a member of the crew, within the statutory exception, regardless of his relationship to the vessel.

(a) Schumann was a "member of the crew" because he was one of the ship's company.

The Act excludes from its application any "member of a crew of any vessel."

The test of exclusion from the Act therefore rests, as to one asserted to be of the crew, in the fact whether or not he has membership in it. It is his status as a member and not the work to which he is assigned as a member of the crew which determines exclusion. The crew, of which the membership is excluded from the Act, is that of the crew "of any vessel." This contemplates a ship engaged in the business for which it was created whether its voyage is long or short. Whether the crew is employed verbally or by written ship's articles, is a matter of no moment. The exclusion is complete if the working place is a vessel and the person employed on such vessel is incorporated into the ship's company operating it.

A most exhaustive case dealing with the question, "Who is a member of the crew?" is a decision by Mr. Justice Story when he was a circuit judge, reported as *United States v. Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740. The

matter arose in a criminal prosecution of the master of a ship who was found guilty of aggravated imprisonment of the ship's chief officer. Under a statute providing that—

"If any master * * * shall, from malice, * * * imprison any one or more of the crew of such ship or vessel," etc.,

he should be punishable under the criminal law of the United States.

It was asserted that the chief officer who worked under the master of the ship was not one of the crew and, therefore, there was no violation of the statute.

The learned justice said that although criminal statutes must be strictly construed in favor of the person accused, nevertheless, the chief officer must be held to be one of the crew, and says, after quoting Johnson's Dictionary, to the effect that the crew is "a company of people associated for any purpose;" that the meaning was the same as applied to a ship's crew, and the Court used the following language:

"And the same learned lexicographer adds, that, when spoken with reference to a ship, the crew of a ship, or ship's crew, means 'the company of a ship,' illustrating it by a verse from Dryden's translation of the Aeneid:

"The anchor dropped, his crew the vessel moor."

The language of the court in its conclusion is:

"The words, master, and crew, in such a connection, naturally embrace all persons on board constituting the ship's company; and our statutes (as we have seen) so interpret them."

In the case of

The Bound Brook, (D. C.) 146 F. 160

the libel by several sailors was for wages. There was an issue as to their being members of the crew as they asserted the invalidity of shipping articles. There was for consideration a treaty between the United States and Germany, providing that differences between the master and the crew of the vessel should be adjusted by the consul. It was asserted that the libel ought to be dismissed and the matter remitted to the German Consul. The court, sustaining this contention, said (p. 164) :

"When the 'crew of a vessel' is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board. 'It matters not whether the contract is verbal or in writing or for a long or short voyage or period.' *The Marie*, (D. C.) 49 Fed. 286, 287."

In the case of

The Marie, (D. C.) 49 F. 286

the action was for wages, and a treaty between the United States and the Kingdom of Norway and Sweden was involved, providing that all differences "between the captains and crews of vessels belonging to the kingdom" shall be settled by the consuls thereof. Libelant in that case was a cook, and it was contended that he was not a member of the crew within the language of the treaty.

The court held that the provisions of the treaty barred the suit and that a cook was a member of the crew, and the court said (p. 287) :

"The words 'crews of the vessels' as here used, include all of the ship's company—all the seaman and

officers, except the captain. Rap. & L. Dict. verb. 'crew,' *U. S. v. Winn*, 3 Sumn. 209.

"The crew of a vessel,—the ship's company,—in a general sense comprises all persons who, in pursuance of some contract or arrangement with the owner or master, are on board the same, aiding in the navigation thereof. It matters not whether the contract is verbal or in writing, or for a long or short voyage or period."

In the case of

The Buena Ventura, (D. C.) 243 F. 797

the court had before it a case involving injury to a "wireless operator." He was paid a monthly stipend of \$100 by the Marconi Wireless Telegraph Company and had a nominal pay of 25 cents per month from the vessel (which was, never in fact, paid him). The libelant becoming ill, the question at issue was whether he was entitled to maintenance and cure at the cost of the vessel as a member of the crew.

The court, after citing with approval the case of *U. S. v. Winn*, 3 Sumn. 209, and *The Bound Brook*, 146 F. 164, said (p. 799):

"The word 'seaman' undoubtedly once meant a person who could 'hand, reef and steer,' a mariner in the true sense of the word. But as the necessities of ships increased, so the word 'seaman' enlarged its meaning. Even in *Bean v. Stupart*, 1 Doug. 11, it was held that a warranty to carry '30 seamen besides passengers' meant that the 30 seamen included a cook, a surgeon, and other employes, and did not mean merely able seamen. And a cook was explicitly held to be a seaman in this court by Betts, J. in *Allen v. Hallet*, Abb. Adm. 573, Fed. Cas. No. 223. By the

same course of reasoning an employe on a barge may be regarded as a seaman. *The Walsh Bros.*, (D. C.) 36 Fed. 607. Also, a cooper. *United States v. Thompson*, 1 Sumn. 168, Fed. Cas. 16,492. See, also, *The Mary Elizabeth*, (C. C.) 24 Fed. 397. This court has even decided that a bartender may rank as a seaman in *The J. S. Warden*, (D. C.) 175 Fed. 314.

"But the reason of the matter is shown best by Judge Benedict's decision in *The North America*, 5 Ben. 486, Fed. Cas. No. 10,314, wherein he held that a fireman was a seaman."

In the case of

In Re Meyer, (D. C.) 74 F. 881.

the proceeding was one to limit liability of a vessel, and it was asserted that she was not seaworthy, in that she did not have a full crew as required by law. By the inspector's certificate she was required to have a master, two mates, two engineers and "12 crew" (making 17 in all). The defendants (p. 892) contended that the word "crew" meant only sailors who could navigate the ship, and that as a crew of 12 was required in addition to those specifically mentioned, this number could not be made up by including a fireman as part of the 12.

The court held—

"*** that the word 'crew,' as used in the certificate, should not be construed to mean sailors only," and that a fireman was a member of the crew.

See also

Jones v. Shepherd Deputy Comm., 20 Fed. Suppl. 345 (deckhand).

A "member of the crew" is not an "employee" under the
Therefore the Deputy Commissioner was without jurisdiction
to make an award.

The jurisdiction of the Deputy Commissioner administering the Longshoremen's and Harbor Workers' Compensation Act is limited to awards on behalf of employees of defined and limited class. The class over which he exercises jurisdiction are employees engaged in work on the navigable waters of the United States other than masters of ships and members of the crew of vessels.

44 Stat. 1424 Sec's 2-3-19, 33 U. S. C. A. chap 18,
Sec's 902, 903, 919.

The scope of powers of the Deputy Commissioner are described in Sec. 2 of the Act as follows:

"The term 'deputy commissioner' means the deputy commissioner *having jurisdiction* in respect of an injury or death." 44 Stat. 1424, 33 U. S. C. A. Sec. 902, par. 7. (Italics ours.)

The powers of the Deputy Commissioner are declared in Sec. 19 of the Act, 44 Stat. 1435 as amended, 52 Stat. 1167, 33 U. S. C. A. chap. 18, sec. 919, which provides that:

"*** the deputy commissioner shall have full power and authority to hear and determine all questions in respect of *such claim*." (Italics ours.)

Such claim" in the instant case is the claim for "death in employee."

44 Stat. 1426, 33 U. S. C. A. chap. 18, Sec. 903.

The "employee" respecting whose death the commissioner has jurisdiction to award upon "such claim" is defined in Sec. 2 of the Act:

"The term 'employee' does not include a master or member of a crew of any vessel." (44 Stat. 1424, 33 U. S. C. A., Ch. 18, Sec. 902.)

Interpolating into Sec. 3 of the statutes prescribing coverage, after the word "employee," the definition in Sec. 2, the pertinent part of Sec. 3 (with the definition interpolated by us in parentheses) reads:

"Compensation shall be payable under this chapter in respect of disability or death of an employee (the term 'employee' does not include a master or member of a crew of any vessel)."

The statute has been construed, as we here contend, by this court in the case of

Crowell v. Benson, 285 U. S. 22.

That case affirmed a decree in favor of a complainant in a suit to enjoin enforcement of an award under Longshoremen's and Harbor Workers' Compensation Act. In that case, this court said, respecting the finality and jurisdiction of the Deputy Commissioner:

"The finality of such determinations of the Deputy Commissioner is predicated primarily upon the provision (§ 19 (a)) that he 'shall have full power and authority to hear and determine all questions in respect of such claim.' But, 'such claim' is the claim for compensation under the Act and by its explicit provisions is that of an 'employee,' as defined in the Act, against his 'employer.' " (P. 62.) (Italics ours.)

In distinguishing true questions of coverage of the Act, which is the issue involved in the case at bar, from cases where an employee covered by the Act is debarred of his

because of intoxication, suicide, etc., this court, in case cited, makes the express distinction:

"Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence, and within the scope of his authority, shall be final." (P. 46.)

Further pursuing that subject, the court says:

"And this finality may also be regarded as extending to the determination of the question of fact whether the 'injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.' While the exclusion of compensation in such cases is found in what are called 'coverage' provisions of the Act (§ 3), the question of fact still belongs to the contemplated 'routine of administration, for the case is one of employment within the scope of the Act and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation.'" (P. 47.)

Distinguished from cases of intoxication, etc., however, situations such as that in the case at bar, where the deceased was a member of the crew and therefore expressly excluded from the jurisdiction of the commissioner, and such cases the court says, in the case cited:

"What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the

determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory scheme." (P. 54.)

When the court in the foregoing citation uses the word "jurisdictional" as related to administrative agency, it means a determination whether or not it falls within the scope of the authority conferred on the administrative agency. As was said in

Interstate Commerce Commission v. Humboldt Steamship Company, 224 U. S. 474, 484,

"It is true, there may be a jurisdiction to determine the basis of jurisdiction (*Ex Parte Harding*, 219 U. S. 263, 55 L. ed. 252, 31 S. C. Rep. 324), but the full doctrine of that case cannot be extended to administrative officers."

The true view of the matter, from a legal viewpoint, is that if an employee is of a class embraced within the benefits of the Longshoremen's and Harbor Workers' Compensation Act, as in case of a longshoreman who is not asserted to be a member of a crew of a vessel, then although both the employer and employee are subject to the Act, the employee may nevertheless be barred of his recovery. This bar of his recovery may be because the injury occurred solely by intoxication of the employee or the willful intention of the employee to injure or kill himself or another (§ 3b).

As this court has noted and explained, both the employer and the employee are, in such case, within the scope of the Act and the commissioner administering it has jurisdiction over the question of compensation; but despite this power of the commissioner to make an award, he may never-

unless refuse an award as part of his administrative powers and duties because the employee has committed an act which estopped him from its benefit. It is in the nature of a *condition subsequent* to application of the Act which despite application of the Act bars damages.

The inquiry and determination on uncontradicted facts whether or not the person in the general employ of another is an "employee" within the Act (because of the fact that he is a master of a vessel or a member of the crew of a vessel), and whether or not power exists in the commissioner to take hold of such controversy, presents a *condition precedent* to the attachment of jurisdiction. The determination of that question is one which goes to the very existence of any power in the commissioner. A court, to which such question is presented according to law, has the authority and the power to determine such question for itself, independently, under the law and the evidence, independent of the findings of the administrative body.

The power of the court independently, under the law and the evidence, to come to its own conclusions as to jurisdiction of the administrative body has prime importance upon the issue whether the trial should be *de novo* or upon the record made before the administrative body.

Even if it were to be assumed that the administrative body had the initial power to determine its own powers and jurisdiction, there would still be the power in the court to review the matter upon the evidence and the record made before the Deputy Commissioner, and such power expressly reserved to the courts by Sec. 21 of the Act, Mar. 4, 1927, c. 509, Sec. 21, 44 Stat. 1436, 33 U. S. C. A. Chap. 18, sec. 921, which provides, paragraph (b):

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part,

through injunction proceedings brought by any party in interest against the deputy commissioner making the order and instituted in the Federal Court.

If, therefore, under the evidence as heard before the Deputy Commissioner, it is proven that Schumann was a member of a crew of the vessel, then an award of compensation is "not in accordance with law," and may be set aside through these injunction proceedings.

Complete power exists to set aside the finding of the Deputy Commissioner because it was without evidence and contrary to the indisputable character of it.

Crowell v. Benson, 285 U. S. 22, 49-50.

Such power to enjoin the order exists where it appears that the deputy has "acted in a case to which the statute is inapplicable."

Crowell v. Benson, 285 U. S 22, 63.

The statute uses the term "member of a crew of any vessel." Schuman was a *seaman*, the term being defined by the *shipping statutes* of the United States, 38 Stat. 1168, Ch. 153, §10; R. S. 4612; 46 U. S. C. A. § 713, as follows:

"In the construction of this chapter * * * every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same (any vessel belonging to any citizen of the United States) shall be deemed and taken to be a seaman."

NOTE—"Apprentices" are persons under 18 years of age as defined R. S. § 4509, 46 U. S. C. A. § 561.

Applying that standard this court has held that any person employed in any capacity on a vessel is a "seaman" and not a "laborer."

It was so held in

Ellis v. United States, 206 U. S. 246,

involving a claimed violation of a statute forbidding laborers from working more than 8 hours per day on public works where it was said that "whatever the nature of their work it is incident to their employment on the dredges and scows . . ." and therefore they were "not laborers or mechanics." (P. 260.)

The case involved proceedings against Eastern Dredge Company for working dredges more than eight hours, "employing two deck hands and an assistant craneman and deck hand upon a dredge" (p. 258). The question was whether such dredge employees, including such deck hands, were laborers or mechanics" within the meaning of the act (p. 258):

This court held that the deck hands and others employed on the dredges were not "laborers within the intent of such statute, but more properly classed as seamen."

In the case of *Maryland Casualty Co., et al. v. Lawson, Deputy Commissioner, et al.*, 94 Fed. (2d) 190, (C. C. A. 5th Cir.—Jan. 20, 1938), the suit was to set aside an award of compensation by the Deputy Commissioner, purporting to act under the Longshoremen's and Harbor Workers' Compensation Act, and to set aside his award for the death of one Burrows. The Court says (p. 192):

"A single question, common to both appeals, needs decision; to wit, Was Burrows an employee within the act, so that the Deputy Commissioner had jurisdiction? This is a question on which his fact findings are not conclusive. *Crowell v. Benson*, 285 U. S. 22, 24."

Burrows was drowned while unloading a scow about three miles off the harbor at Miami.

The court says (p. 192):

"We attempt no definition of the crew of a vessel. Who are included was discussed recently, from different standpoints, in *De Wald v. B. & O. R. Co.*, 4 Cir., 71 F. 2d 810 and *Wandtke v. Anderson*, 9 Cir., 74 F. 2d 381. There is implied a definite and permanent connection with the vessel; an obligation to forward her enterprise and to protect her in emergency, and a right to look to her and her earnings for wages. If she has a master, there is subjection to his commands. The nature of the work done is not determinative. Engineers and cooks as well as sailors are included. Longshoremen who load and unload a vessel under temporary local employment do not become members of the crew, nor do mechanics who similarly come aboard her to repair or clean or paint her; nor do those permanently employed upon her cease to be members of the crew because they are put at the same sort of work."

The court says the evidence is without contradiction that the dredge *Corozal*

"* * * was in command of a licensed master and was clearly a vessel with a crew within the meaning of the act, under our holding in *Kibadeaux v. Standard Dredging Co.*, 5 Cir., 81 F. 2d 670; *Standard Dredging Co. v. Kibadeaux*, 299 U. S. 549." (P. 192.)

Burrows worked on the scow. He was hired by the master of the dredge, on which he was fed and quartered. He signed no seaman's articles, and was not shown to be an experienced sailor.

"* * * But he and another were put aboard this scow and remained there during their daily shifts

of eight hours handling her lines, doing what was necessary to her navigation, and attending to dumping and cleaning her at sea.

While alongside the dredge and while aboard the dredge, they took orders from the master of the dredge. . . . He was employed under the title 'deckhand,' and the evidence is that men at his work were always so called." (P. 193.)

The court holds that:

" . . . The Deputy Commissioner was without jurisdiction. The judgments are reversed and the causes remanded, with direction to set aside his award." (P. 193.)

We call attention to the sister case of *Lawson, Deputy Commissioner, et al. v. Maryland Casualty Co.*, 94 F. (2d) 93 (C. C. A. 5th Cir.—January 20, 1938), by the same court, where a workman who performed his duties on a barge which was used to place dynamite and explode, was held to be under the Longshoremen's Act and not member of the crew of any vessel. The court, in that case, stressed the fact that his work was not assigned and directed by the master, but by a land foreman; that his work was directed not as part of the dredge activity as directed by the master, but by the superintendent of the dredging company, who was the master's superior and who could take the skiff where he desired.

The conclusion of the court's opinion was that:

"He was bound to no vessel as a crew member, and entitled to a lien on none for his wages." (P. 194.)

We respectfully submit that the two foregoing cases indicate the line of division. It cannot be questioned that

if Schumann had not been paid his wages he would have had a lien on the Koal Kraft to recover them, and could have proceeded *in rem*.

All his duties were performed on the Koal Kraft, and none on shore (R. 21).

He was under the exclusive direction of the master, who paid him (R. 17).

He was one of the number of persons required by the certificate as a member of the crew (R. 65), and if he left the vessel and were not replaced by another, the vessel could not operate lawfully at all (R. 42).

The case of *Maryland Casualty Co. et al. v. Lawson*, 94 Fed. (2nd) 190, above cited, was called to the attention of the Circuit Court of Appeals in the case at bar in our brief and again on rehearing (R. 99, 100) but for some reason that learned court neither cited or discussed the decision which we regarded as of controlling importance.

In the case of *Kibadeaux v. Standard Dredging Co.*, 81 Fed. (2d) 670 (certiorari denied by Supreme Court of United States, *Standard Dredging Co. v. Kibadeaux*, 299 U. S. 549,) the opinion is by the Circuit Court of Appeals, Fifth Circuit—Feb. 3, 1936. The facts in that case (see p. 673), comparatively with the facts of the case at bar, are as follows:

The steam dredge Burlington was a vessel of 351 tons gross. (In the case at bar the Koal Kraft was 376 tons gross (R. 65).)

The dredge in the case cited had a master, engineers, oilers, firemen, levermen, mates, deck hands, cooks and helpers, timekeeper and a civil engineer.

The dredge in the case cited had no motive power of her own (P. 673.) (The Koal Kraft was a vessel proceeding under her own steam power (R. 14, 65).)

In the case cited the men were paid bimonthly wages and fed on the dredge, working eight hour shifts, but at their option could go ashore after their working hours to spend the night (p. 673). (Schumann was paid bimonthly, fed himself, and slept ashore (R. 49).)

In the case cited Kibadeaux was "employed as a deck hand, with duties as a general helper" (p. 673). (Schumann's duties were similar (R. 50, 51).)

The court held Kibadeaux was a seaman, and stresses the fact that he was the type of a person who would have a maritime lien for his wages (p. 674). (The same is true as of Schumann.)

The court (quoting from *Ellis v. United States*, 206 U. S. 246) says that all dredge hands are seamen within the definition of an earlier statute of the United States, because they are "called upon for more or less of the services required of ordinary seamen" (p. 674). The fact that the work is all performed on board ship is of importance, and the court says:

"Whatever the nature of their work, it is incident to their employment on the dredges and scows, as in the case of an engineer or coal shoveler on board ship." (P. 674.)

A libel to recover damages independent of the Longshoremen's Act was sustained, on the ground that the Longshoremen's Act did not apply.

The foregoing decision raises a highly pertinent question. If Schumann had been injured instead of being

killed, and had brought a libel in admiralty against the Koal Kraft for injuries, the question would necessarily arise in such case whether he was entitled to maintain his action or whether he was remitted to his action under the Longshoremen's Act. This question was decided by the Circuit Court of Appeals in the *Kibadeaux* case as a judicial question requiring the court to determine whether or not the facts brought the case within the jurisdiction of the court or within the jurisdiction of the Deputy Commissioner administering the Longshoremen's Act, because the jurisdiction of one would be exclusive of the jurisdiction of the other.

The evidence was repeated and uncontradicted, that the deceased, John Schumann, was a "deck hand" or otherwise described as an ordinary seaman (Dep. Comm. R. 15, 16, 20, 35; Dist. Ct. R. 49, 51, 52), as distinguished from an able seaman (Dist. Ct. R. 66). The ordinary seaman or deck hand does the manual labor on a ship, such as scrubbing decks, painting, and handling the lines of the ship and any other incidental work to be done primarily by hand. The fact that he is not a skilled mariner, able to reef a sail or handle a tiller, is of no importance. Commonly deck hands are employed on steam vessels, which are propelled by steam and not by sail. Lexicographers all agree on the definition of a deck hand, and this is illustrated in Webster's New International Dictionary, Second Edition, where the definition appears as follows:

"Deck hand. A common sailor, esp. one employed on steamers or coasting vessels."

A common laborer on shore working on a farm (farm hand) or on a dock (longshoreman) or elsewhere than on a ship may be a "hand," but not a *deck-hand*. The nautical conception of a "hand" is commonly and universally

recognized, and in Webster's International Dictionary, Second Edition, under the title "hand," the definition (numbered 27) reads:

"Naut. A member of a crew."

To say that a deck hand is an ordinary laborer and not a member of a crew of a vessel, although he performs all the services of an ordinary seaman, is violative of common and nautical understanding and contrary to the decisions of the courts.

(c) Deceased was a "member of the crew," a deckhand, notwithstanding the fact that he did not sign "shipping articles."

Respondent contended in the Circuit Court of Appeals, and that court apparently gave weight to the fact, that the deceased, John Schumann, did not sign shipping articles and therefore respondent asserted he was not a member of the crew.

Membership in the crew does not rest upon the fact of signing or not signing of shipping articles (even when required by law), but for failure to conform to such requirements of statute, the master and the ship may become liable to penalties for violation.

There is no substance to the claim that shipping articles were required to ship a crew on the Koal Kraft, which operated only in Calumet River and Indiana Harbor and never operated at any time except in the navigable waters within the State of Illinois or occasionally to ports in Indiana, which is an adjoining state.

The statute governing this matter is Rev. Stat. 4520, 46 U. S. C. A. ch. 18, § 574. (This section is set out in full in Appendix p. 63). The act was derived from the Act of July 20, 1790, ch. 29, § 1, 1 Stat. 131; Act of June

7, 1872, ch. 322, § 12, 17 Stat. 264. The portion of this section having bearing on this case is as follows:

"Every master of any vessel of the burden of 50 tons or upwards, bound from a port in one state to a port in any other than an adjoining state *** shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman on board such vessel," etc.

(The statute requiring shipping articles upon merchant vessels bound to foreign ports is Rev. Stat. § 4511, 46 U. S. C. A. ch. 18, § 564.) Appendix p. 63.

The statutory provisions requiring shipping articles under specified conditions have been held inapplicable to tugs towing vessels from one lake to another (*The John Martin*, 13 Fed. Cas. No. 7357) and have been held inapplicable to fishing or whaling voyages not from port to port. The theory behind the statutes is entirely reasonable. The purpose of shipping articles in writing is to declare the voyage and the term of time for which seamen are shipped, and the rate of wages, and when the seamen are to render themselves on board; and are applied only to seamen upon voyages to foreign ports and to ports of another state other than an adjoining state.

3 Kent's Commentaries 177; also Note (b), same page.

One of the chief purposes of such shipping articles is to declare the voyage, so that the seamen may not be impressed pursuant to a deviation, by being taken to a different port than that in contemplation and having the length and term of his voyage entirely variant from his intentions, and to prevent the breaking up of a voyage at a far point of the world by the abandonment of the

ship by the sailor or the ejection of him from the ship by the master. These considerations obviously have no application where the vessel operates in a local port or between ports in immediately adjoining states. Whaling voyages, where no port is in contemplation and fishing trips to the Grand Banks also require no shipping articles, because the provision as to shipping articles contemplates only voyages to foreign ports or ports of other states not adjoining.

"In this view, neither fishing nor whaling voyages are strictly foreign voyages. This is the sense in which foreign voyages are understood in the Duties Collection Act of 1799, c. 128, and in the act of 1790, c. 56, and of 1813, c. 2, relative to shipping articles."

3 Kent's Commentaries, 177.

Although whaling voyages are not within the terms of the statute, by custom in the whaling industry private contracts (not statutory shipping articles) were commonly employed by custom.

3 Kent's Commentaries, 177, Note (b).

See

Burdett v. Williams, 27 F. 113, 117.

In the case of *Tharson v. Peterson*, 9 Fed. Rep. 517, before Blodgett, D. J., in District Court, the status of a seaman, not signed under shipping articles, on a voyage between Illinois and Michigan was considered as follows:

"But this statute is only applicable to voyages from a port in one state to a port 'in any other than an adjoining state,' and as this court is bound to take notice of the legally established boundaries of the different states, it must be held that Illinois and Michigan are 'adjoining states' within the meaning of this statute."

A libel based upon the claim that there was a violation of law in not having signed shipping articles was held not sustainable on this ground, as shipping articles were held not required by law (p. 519).

In the case at bar, the vessel proceeded from a dock on the Calumet River in the State of Illinois to another vessel at anchor in the same stream, also in the State of Illinois (Dist. Ct. R. 48, 50).

The requirements for written shipping articles being of statutory creation, such written articles are not required in the cases not covered by the statute.

"Libelants contend that in the case at bar, even in the absence of statute a written agreement with seamen before proceeding on a voyage to Mexico is required by the general maritime law. In view of the legislative history of Acts requiring such written agreement, this contention is untenable."

The Lilly, 69 F. (2d) 898 (C. C. A. 9th Cir.).

See also review of the history of these statutes in

U. S. v. The Brig Grace Lothrop, 95 U. S. 527, 532.

The John Martin, Case No. 7357, 13 Fed. Cas. 694, 2 Abb. U. S. 172 (1870).

This latter case was a libel *in rem* in admiralty for wages brought by the engineer of a tug where the defense was that the libellant had deserted and could not recover. The court found that the contract of hiring was an oral one, on a month to month basis.

In discussing shipping articles, and requirement of their execution, the court said:

"In cases in which such contract is required, and the nature of the contract, are prescribed in the first

sentences of the act, in the following words: 'Every master or commander of any ship or vessel bound from a port of the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upward, bound from a port in one state to a port in any other than an adjoining state, shall, before he proceed on such voyage, make an agreement in writing or in print, with every seaman or mariner on board such ship or vessel, *** declaring the voyage or voyages, term or terms of time for which such seaman or mariner shall be shipped.'

Now in this case, the vessel is a tug, engaged in towing vessels between Lakes Erie and Huron, through the Detroit and St. Clair rivers, and over the St. Clair flats. She was from the port of Detroit, in the state of Michigan, but was not bound to 'any foreign port,' and although a vessel of upwards of fifty tons burden, she was not bound to a 'port in any other than an adjoining state.' She, in fact, was not bound to any port whatever. Her destination and employment was almost exclusively out upon the open water. It is true, in the prosecution of her occupation, she might and might not run into Canadian waters, or stop at points on the Canadian shore for wood or other supplies, as it is shown that she did at Malden, on September 23, on her way back from Lake Erie to Detroit, but clearly this does not bring her within the description of vessels to which the statute is intended to apply. It is said that she also frequently ran into waters and sometimes took her tows into ports in the state of Ohio; but Ohio is an adjoining state, and therefore not within the statute.

The statute was intended to apply to vessels engaged in foreign commerce, and inter-state commerce,

other than between adjoining states, and of course not to a case of this kind. See *Milligan v. The B. F. Bruce* [Case No. 9,602]. The act of 1856 (11 Stat. 62, § 25) must be construed together with the act of 1790, *in paria materia*, and as constituting part and parcel of the same general system, and therefore the remarks above made in relation to the act of 1870 will apply with equal force to that of 1856."

(d) **The character of the steamer Koal Kraft.**

The Koal Kraft was a licensed vessel of the United States (R. 61). She had an inspection certificate issued by Vessel Inspectors (R. 65, 48). She was a vessel subject to inspection and certificate governing crew.

48 Stat. 125, Ch. 61, § 4399, 46 U. S. C. A., § 361.

She was required to be inspected by Government Inspectors annually, and certificate to be issued by inspectors, without existence of which she would not be permitted to enter into navigation.

33 Stat. 1023, Ch. 1454, § 4417, 46 U. S. C. A. § 391 (Hull Inspection);

48 Stat. 125, Ch. 61, § 4418, 46 U. S. C. A. § 392 (Boiler Inspection).

There are provisions for certificate to be issued by the inspectors.

38 Stat. 1216, Ch. 184, § 4421, 46 U. S. C. A. § 399.

By statute, power is given steamboat inspectors to designate the complement of licensed officers and crew and to make such designations in their certificate. A

vessel may not be navigated unless she complies with these directions.

R. S. § 4463; Apr. 2, 1908, c. 123, § 1, 35 Stat. 55; Mar. 3, 1913, c. 118, § 1, 37 Stat. 732; Mar. 4, 1915, c. 153, § 14, 38 Stat. 1182; May 11, 1918, c. 72, § 1, 40 Stat. 548; June 30, 1932, c. 314, § 501, 47 Stat. 415; 46 U. S. C. A. Ch. 11, Sec. 222.

The rules and regulations of the Board of Supervising Inspectors for the Great Lakes have the force and effect of an act of Congress.

Leathem, Smith-Putnam Navigation Co., et al., v. National Union Fire Ins. Co., et al., 96 Fed. (2d) 923, 927.

The certificate of the Koal Kraft required "1 licensed master and pilot, 1 licensed chief engineer, * * * 1 fireman" and in addition, "3 seamen" (R. 65).

Schumann was one of such 3 seamen. If he, or some one in his place were not on board, the vessel could not operate in the absence of such crew of 6 aboard (Dist. Ct. R. 54).

II.

The District Court had plenary power under the statute to investigate lawfulness of the award and did not err in trying such issue de novo.

Inferences of law drawn by the deputy commissioner from undisputed facts are not conclusive. The statute provides for a review in Federal Court of any award "if not in accordance with law" (Sec. 21(b)).

Such review is provided to be had by independent suit and not upon the narrow principles incident to certiorari at common law.

Whether the trial should be *de novo* or upon the record made before the deputy commissioner is a procedural question which should not be controlling because the evidence was virtually identical on both hearings.

Petitioners asserted in their bill for injunction that an injunction ought to issue because the plaintiffs and the deceased, Schumann, are not persons comprehended within the terms of the Longshoremen's and Harbor Workers' Compensation Act (R. 5). Respondent, by his answer, contended to the contrary (R. 46).

On the production of evidence on the hearing of the case in court, no objection was made to the *de novo* hearing, but the production of evidence in court was without objection (R. 47, 54).

The evidence so produced in open court was in substance the same as that produced before the Deputy Commissioner and it was so asserted at conclusion of the trial by counsel for respondent (R. 59).

Opposing counsel stated that the only thing new was the certificate (Certificate of Inspection, Plaintiffs' Ex. 1, R. 65, offered at R. 48). The terms of such certificate were informally proven before the Deputy Commissioner and its formal production then dispensed with, because it was posted in the pilot house of the ship (R. 41, 42).

With the exception of production of this certificate itself, it was conceded by opposing counsel, and it is a fact, that there was nothing substantially new outside of the record produced before the Deputy Commissioner (R. 59), and all of the proceedings before the Commissioner were introduced in evidence before the court by agreement (R. 61). Both the District Court and the Circuit Court of Appeals concluded that it was a matter of no special importance

whether the case was heard upon the record before the Deputy Commissioner or upon the evidence heard in open court, and the Circuit Court of Appeals held that whether considered upon the record before the Deputy Commissioner or upon the hearing before the court, as the facts were not in dispute, the conclusion to be drawn by the court would be the same from either record (R. 91-92).

The Circuit Court of Appeals for the Sixth Circuit under similar circumstances held that assigning error and the granting of a trial *de novo* was immaterial where the same conclusions would be drawn from each record and, therefore, it was not necessary to pass upon such procedural question.

Taylor v. McManigal, Dep. Com'r. and Ellice Watkins, 80 F. (2d) 583.

Even if considered upon the record made before the Deputy Commissioner, the court has the power to draw appropriate legal inferences as to jurisdiction or want of it from the record, and if that shows a want of jurisdiction, namely, that the claimant is a member of the crew, an injunction may issue.

Jones v. Shepard, Dep. Com'r., et al., (D. C.) 20 Fed. Supp. 345.

All the foregoing considerations aside, it has been determined by this court that trial *de novo* is appropriate, and as the case has already been cited to the court in other portions of this brief at some length, we shall not note it with particularity here, except to again cite it to the court.

Crowell, Dep. Com'r. v. Benson, 285 U. S. 22.

(See, particularly, discussion at pages 48, 49-50, 62, 63.)

We believe that any question as to trial *de novo* is further foreclosed by the fact that the case was tried upon the theory of a trial *de novo* in the District Court, and an inconsistent position may not be asserted on appeal by the person who made no objection to so hearing it in the trial court.

3 Corp. Jur. 718, Sec. 618.

4 Corp. Jur. Sec. 465, Sec. 241 (a).

III.

The District Court having made Findings of Fact and Conclusions of Law which were not assailed on appeal, the Circuit Court of Appeals was bound in law to affirm the judgment of the District Court.

The court held three Conclusions of Law (R. 69) and made nine Findings of Fact (R. 70-71), all of which we have set forth in our Statement of Facts (*Ante* pp. 10-13).

The only error specifically asserted by respondent against the Findings of Fact and Conclusions of Law was directed to the finding of the District Court that—

“John Schumann was a member of the crew of the vessel on which he was working” (R. 74).

This assignment is directed to Finding of Fact No. 7 (R. 71), and the Court of Appeals so treated it and did not advert to any other finding, unless by inference to a portion of Finding of Fact No. 5 (R. 70), wherein the District Court found that at the time of his death the deceased “was a seaman.”

We call attention to unchallenged Findings of Fact and Conclusions of Law which, upon this record, we think stand uncontroverted, not only because they are uncontradictedly

proven by the evidence, but because they were not challenged or assailed by respondent in the points asserted in the Circuit Court of Appeals.

(Numbers herein refer to numbered Findings of Fact, R. 70-71.)

On October 31, 1937, the deceased, Schumann, came to his death by drowning in the Calumet River while employed on the vessel Koal Kraft (1).

The drowning occurred while the Koal Kraft was navigating the Calumet Harbor and River, navigable waters of the United States (3).

Schumann was employed as a deck hand on the vessel Koal Kraft and, as such, his duties consisted in making lines fast, loosing them, keeping the vessel clean, and various duties incident to fueling vessels, in which trade the said vessel was at that time engaged (3).

During employment of the deceased by South Chicago Coal & Dock Company he performed the duties of a deck hand aboard the vessel Koal Kraft which, at the time he lost his life, was being navigated in the Calumet River between plaintiff's dock at 95th Street and the vessel Ashley at 104th Street and Calumet River, both the dock and such vessel to be fueled being in Cook County, Illinois (4).

At the time, the vessel was being operated not to exceed twelve hours of the day. The members of the crew on the voyage during which Schumann was lost overboard were the master, engineer, fireman, and three deck hands, one of whom was John Schumann (6).

The Koal Kraft was, at the time, a vessel of the United States, engaged in harbor navigation, with a crew and ship's papers (9).

The Conclusions of Law (R. 69), as herein next recited, were unassailed on appeal by the respondent and their propriety stands conceded on the record (numbers refer to numbers of three respective Conclusions of Law held by the court, R. 69).

The court found the crew-membership required under the law, and that the Koal Kraft when operating not to exceed twelve hours was permitted so to do "with a crew of one licensed master and pilot, one licensed chief engineer, three seamen and one fireman" (R. 69) (1).

"Under the law, a member of the crew of a vessel is not, nor is the owner of such vessel, subject to the jurisdiction of the Commissioner or Deputy Commissioner . . . justifying any award of compensation for the death of a deck hand, a member of the crew" (3).

In reviewing the Findings of Fact and Conclusions of Law which we assert are unchallenged and stand admitted, we have intentionally omitted Findings of Fact and Conclusions of Law which might be held to be challenged by the points upon which respondent relied on his appeal to the Circuit Court of Appeals (R. 73-74).

We specially call attention to the fact that the District Court's findings that the legal conclusion, that the employee relation as a member of the crew was essential as a jurisdictional requirement to warrant the Deputy Commissioner in taking jurisdiction to make any award, was not assailed in any way.

As it stands admitted, as we contend, that the deceased was a deck hand, employed as such, with duties of making lines fast, loosing them, keeping the vessel clean, and various duties incident to fueling vessels, the question

whether he was a seaman or a member of the crew is one which can be answered in only one way under the foregoing unchallenged Finding and Conclusions.

We think the Circuit Court of Appeals intended by its opinion that all these facts as found by the District Court should be taken as conceded, because that court says:

"In either case the facts are not in dispute. Therefore on undisputed evidence, is the finding, which we might call a conclusion that the deceased was a seaman, consistent with the undisputed facts?"

"Convinced as we are that the evidence establishes a non-seaman status it follows that the court erred in holding to the contrary." (R. 91-92.)

The Circuit Court of Appeals said in its opinion:

"• • • that the inquiry into the crew-membership status is not jurisdictional in character, and, therefore, is one for the commissioner to determine, and his determination if supported by the evidence may not be disturbed by the District Court." (R. 88.)

The District Court held under Conclusion of Law No. 3 (R. 69) that, under the law, no jurisdiction existed in the Deputy Commissioner, and that a member of a crew of a vessel is not subject to the jurisdiction of the Deputy Commissioner under the Act in question (R. 69). This finding of law, as to the extent and limits of the jurisdiction of a Deputy Commissioner, is not challenged in the points asserted by respondent on the appeal to the Circuit Court of Appeals (R. 74).

If the question whether a person is a master or is a member of the crew, is subject to final determination of the Commissioner on undisputed evidence; and if he may

draw inferences which the District Court is bound to follow and not independently to examine, then it is fair to state that there can in no case be any independent examination under the law and the evidence, by any court, of any question of jurisdiction of the Deputy Commissioner. As we read the case of *Crowell v. Benson*, 285 U. S. 22, this court has held against such conclusion of the Circuit Court of Appeals.

IV.

Analysis of the Opinion of the Circuit Court of Appeals (104 Fed. 2nd. 522).

We have already called attention to parts of the opinion of the Circuit Court of Appeals (R. 84) especially as to the jurisdictional nature of crew-membership (See this brief ante Points I-III). The Circuit Court of Appeals in its opinion (R. 88) says that:

“ * * * the inquiry into the crew-membership status is not jurisdictional in character.”

We regard this position of the Circuit Court of Appeals as unsound under the determination of that identical issue by this Court in *Crowell v. Benson*, 285 U. S. 22.

The Circuit Court of Appeals says, in effect, that an inquiry whether or not a deceased deck hand is a member of the crew is no more a question of jurisdiction of the Deputy Commissioner than is the issue of suicide (R. 88). The Longshoremen's Compensation Act provides that suicide shall bar a recovery, but that issue is clearly not jurisdictional because it is a question of allowing or not allowing a compensatory amount for death in a case over which the Deputy Commissioner concededly has jurisdiction to make an award. An award is barred, however, because of the wrongful act of the person who is within the terms of the Act

(on the principles which would be applied in the case of a release or assertion of an estoppel). The distinction between a defense of suicide of one concededly under the Act and a defense against a compensation claim that the person asserting the claim never was under the Act, presents two distinct propositions: the latter being jurisdictional, and the former not.

See

Crowell v. Benson, 285 U. S. 22, 47.

The Circuit Court of Appeals in its opinion compares the status of a deck hand on a vessel engaged in navigation with a case of a watchman of a vessel moored at a dock, not engaged in navigation and without a crew aboard.

We think the court has clearly fallen into error in citing cases of watchmen on a ship not in commission who are, of course, not seamen or members of a crew under the circumstances mentioned. (See opinion of the Circuit Court of Appeals Note at R. 90 and 91.)

The opinion undertakes to make an invalid and unsound distinction when it says (R. 91), that although the Certificate of Inspection by the Vessel Inspectors required a crew of five in addition to the master that, nevertheless, in the language of the Circuit Court of Appeals:

“While we have given some weight to the fact that the Certificate of Inspection required a crew of five in addition to the master and that in this instance five would be present only if Schumann were included, we are convinced that the word ‘crew’ as used in the certificate has a different significance and connotation than the word ‘crew’ as used in the statutory exception” (R. 90-91).

This distinction, the Circuit Court of Appeals says, rests in the fact that the task performed by Schumann—

“• • • might just as well have as its background a coal truck, a roundhouse or a mine as a steamship. It was an ordinary laborer's job and it was merely happenstance that the location of this position was on shipboard.”

There is no doubt that if the lines were loosed from the dock by a dock laborer or loosed at the other end on board ship by a deck hand, that the character of the particular task would be the same. It cannot be questioned that one who paints a building and one who paints the deck of a ship in each case may similarly use paint and a brush and thus apply a coat of paint to the object on which he is working. If the position in the opinion were sound, a fireman on a vessel would never be a member of the crew because shoveling the coal under the boiler of a vessel does not involve essentially different character of labor from shoveling the coal under a boiler ashore. A radio operator on board a ship does not perform his duties in sending or receiving messages in any different way than a radio operator in a station ashore.

To follow this argument to its logical conclusion, no one could be a member of a crew except, perhaps, the master or chief engineer, because it would be possible to imagine similar work being performed on land and, therefore, it would be “merely happenstance that the location of this position was on shipboard.” It is rare, however, that a fireman firing a boiler in a factory or a coal shoveler in a coal yard drown as Schumann did. The fireman in the factory and the coal shoveler in the boiler house ashore are also not wards of the court of admiralty. Neither could it be anticipated that they might be ordered

by their foreman to climb a mast, to help let go an anchor or to help splice a broken rope. The Circuit Court of Appeals is in error in minimizing the circumstance of location where the work is performed, because the very essence of membership in a crew is that such member of the crew is one of the ship's company. The fact that he works on a ship and not on the land makes him subject to the exclusive direction of the master of the ship and he is so identified with the ship that he can demand that, if ill, he may have his maintenance and cure; if his wages be not paid, he may have a lien on the ship, etc. Membership in a ship's company carries with it privileges and obligations of differing character than land work even if the muscular effort in performing routine duties are alike. Congress having, in the Act, made the distinction between members of a crew and all other persons, the court has no right to ignore or refuse cognizance of it or to assert that no difference exists. Unwittingly the Circuit Court of Appeals has taken the functions of Congress upon itself.

There is nothing in the Act remotely indicating that the words "member of a crew" have any peculiar or unusual meaning. The exclusion of members of a crew and a master from the "*benefits*" of the Longshoremen's and Harbor Workers' Compensation Act also excludes them from the *drawbacks* incident to being under the Act.

It may well be that a person suffering injury from the neglect and fault of the vessel and its owners would prefer to have his action for damages and not to have compensation under the Act. In truth, the history of this Act discloses that the masters and seamen urged Congress to except them from the Act because they did not want it.

CONCLUSION.

A farmhand is a workman doing ordinary work on a farm.

A factory hand performs assigned tasks in a manufactory.

A deck-hand is in a similar position on ship board.

A watchman on a ship out of commission is not one of a ship's company for the ship's company is disbanded. The ship is hibernating and its functions suspended. Therefore a watchman on shipboard is not one of the crew of a vessel.

A deckhand on a vessel operating upon navigable waters is as essential to existence of a complete ship as the anchor and the mooring line.

The test leading to the conclusion that a person is a "member of a crew of any vessel" involves a determination:

- (a) That the place of performance of duties is upon navigable waters.
- (b) That such duties be performed primarily on ship-board.
- (c) That the workman owes a duty of obedience to the directions of the ship's officers (primarily the master) with a correlative duty of protection of him by the ship's officers.
- (d) That the work have relation to the operation of the ship (as distinguished from a watchman or painter working on her while she is out of commission).
- (e) That the ship have a company of persons contributing to her operation, of whom the person in question is one.

If the foregoing determinations are in the affirmative, the person so employed is a member of the crew.

The conclusion that one is a member of the crew is not defeated if the fact be:

- (1) That his labors involve the same muscular efforts which would be involved in accomplishing a similar task on land.
- (2) That his inexperience does not permit putting him at the work requiring the skill of an able seaman.
- (3) That the voyage is short, and his employment by the master is oral.
- (4) That the workman is paid a compensation out of which he pays for his own food and lodging in place of the ship paying him a reduced sum of money and furnishing his keep.

John Schumann was unquestionably a member of the crew of the Koal Kraft. The respondent as Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act had no jurisdiction to make an award for compensation or bar a suit for damages for the death of Schumann. The award should be permanently enjoined.

The decree of the District Court enjoining the award was right.

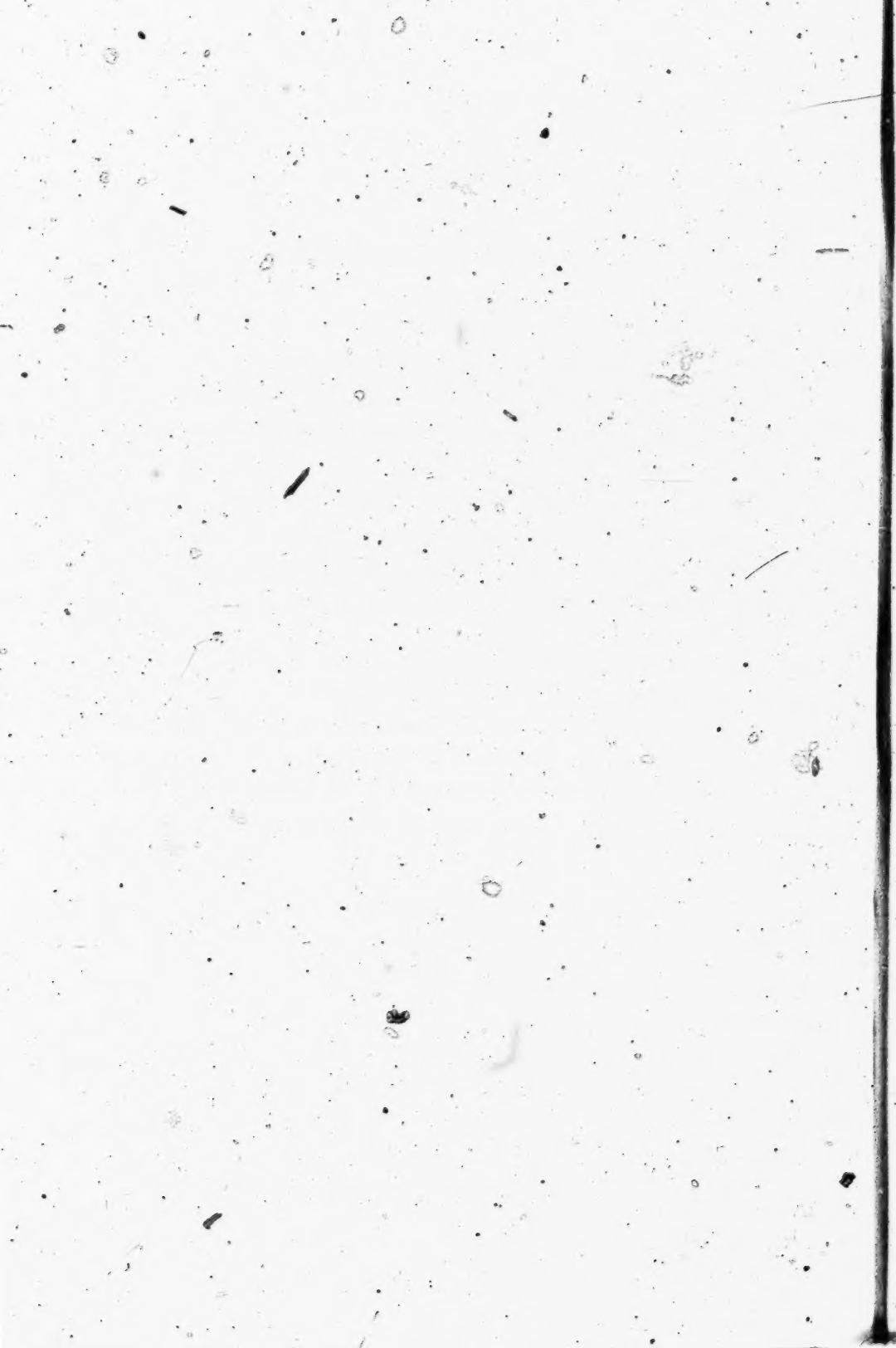
The order of reversal made by the Circuit Court of Appeals should be vacated and set aside. That is the relief we ask.

Respectfully submitted,

ROBERT J. FOLONIE,

HAYES MCKINNEY,

Counsel for Petitioners.



APPENDIX.

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

"Sec. 1. *Short title.* This chapter may be cited as 'Longshoremen's and Harbor Workers' Compensation Act.' (Mar. 4, 1927, c. 509, § 1, 44 Stat. 1424, 33 U. S. C. A. c. 18, § 901.)"

"Sec. 2. *Definitions.* When used in this chapter—

"••• (3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

"••• (7) The term 'deputy commissioner' means the deputy commissioner having jurisdiction in respect of an injury or death.

"••• (12) 'Compensation' means the money allowance payable to an employee or to his dependents as provided for in this chapter, and includes funeral benefits provided therein. ••• (Mar. 4, 1927, c. 509, § 2, 44 Stat. 1424, 33 U. S. C. A. c. 18, § 902.)"

"Sec. 3. *Coverage.* (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, § 3, 44 Stat. 1426, 33 U. S. C. A. c. 18, § 903.)"

"Sec. 9. * * *. *Compensation for death.* If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following: * * * (Mar. 4, 1927, c. 509, § 9, 44 Stat. 1429; as amended June 25, 1938, c. 685, § 6, 52 Stat. 1166, 33 U. S. C. A. c. 18, § 909.)"

"Sec. 19. * * *. *Procedure in respect of claims.* (a) Subject to the provisions of section 13 of this chapter a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim. * * * (Mar. 4, 1927, c. 509, § 19, 44 Stat. 1435, as amended June 25, 1938, c. 685, § 9, 52 Stat. 1167, 33 U. S. C. A. c. 18, § 919.)"

"Sec. 21. * * *. *Review of compensation orders.* (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in

subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

"(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage. * * * (Mar. 4, 1927, c. 509, § 21, 44 Stat. 1436, 33 U. S. C. A. c. 18, § 921.)"

COMPLEMENT OF OFFICERS AND CREW.

"§ 222. *Complement of officers and crew of passenger vessels; penalties.* No vessel of the United States subject to the provisions of this chapter or chapters 14 or 15 or to the inspection laws of the United States shall be navigated unless she shall have in her service and on board such complement of licensed officers and crew including certified lifeboat men, separately stated, as may in the judg-

ment of the local inspectors who inspect the vessel be necessary for her safe navigation. The local inspectors shall make in the certificate of inspection of the vessel an entry of such complement of officers and crew including certificated lifeboat men, separately stated, which may be changed from time to time by indorsement on such certificate by local inspectors by reason of change of conditions or employment. Such entry or indorsement shall be subject to a right of appeal, under regulations to be made by the Secretary of Commerce, to the supervising inspector and from him to the Supervising Inspector General, who shall have the power to revise, set aside, or affirm the said determination of the local inspectors.

"If any such vessel is deprived of the services of any number of the crew including certificated lifeboat men, separately stated, without the consent, fault, or collusion of the master, owner, or any person interested in the vessel, the vessel may proceed on her voyage if, in the judgment of the master, she is sufficiently manned for such voyage: *Provided*, That the master shall ship, if obtainable, a number equal to the number of those whose services he has been deprived of by desertion or casualty, who must be of the same grade or of a higher rating with those whose places they fill. If the master shall fail to explain in writing the cause of such deficiency in the crew including certificated lifeboat men, separately stated, to the local inspectors within twelve hours of the time of the arrival of the vessel at her destination, he shall be liable to a penalty of \$50. If the vessel shall not be manned as provided in this section, the owner shall be liable to a penalty of \$100, or in case of an insufficient number of licensed officers, to a penalty of \$500. (R. S. § 4463; Apr. 2, 1908, c. 123, § 1, 35 Stat. 55; Mar. 3, 1913, c. 118, § 1, 37 Stat. 732; Mar. 4, 1915, c. 153, § 14, 38 Stat. 1182; May 11, 1918, c. 72, § 1, 40 Stat. 548; June 30, 1932, c. 314, § 501, 47 Stat. 415, 46 U. S. C. A. Chap. 11, § 222)."'

SHIPPING ARTICLES.

“§ 564. *Shipping Articles.* The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:

• • •

(R. S. § 4511; Mar. 3, 1897, c. 389, §19, 29 Stat. 691; Feb. 14, 1903, c. 552, 32 Stat. 829; Mar. 4, 1913, c. 141, 37 Stat. 736, 46 U. S. C. A. chap. 18, § 564.)”

“§ 574. *Shipping Articles for Vessels in Coasting Trade.* Every master of any vessel of the burden of fifty tons or upward, bound from a port in one State to a port in any other than an adjoining State, except vessels of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman on board such vessel except such as shall be apprentice or servant to himself or owners, declaring the voyage or term of time for which such seaman shall be shipped. (R. S. § 4520, 46 U. S. C. A. chap. 18, § 574.)”



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1939

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY, AN
ILLINOIS CORPORATION, AND LONDON GUARANTEE
& ACCIDENT COMPANY, LTD.,

Petitioners,

vs.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED
STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH
COMPENSATION DISTRICT,

Respondent.

CERTIORARI TO CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

Reply Brief for Petitioners.

ROBERT J. FOLONIE,
HAYES MCKINNEY,
Counsel for Petitioners.

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REVIEW OF STATEMENT AS MADE BY
RESPONDENT.

Respondent's brief states (Respondent's brief, p. 3) that whenever one of the crew failed to show up, he "would be replaced by someone picked up at random (R. 42)." This is an inference drawn by respondent, which we believe to be in error. The evidence is uncontradicted that the deceased, John Schumann, had been continuously a regular member of the crew from October 15 to October 31, 1937 (R. 13). The master of the vessel was interrogated hypothetically how he would have replaced Schumann or any other member of the crew if one of them failed to show

up for duty, and the master said he would have to make up his full crew before he could operate his ship. If necessary, he would call up the Inspectors for permission to operate with a short crew. The place to which he would have resort to replace a member of the crew, if necessary, would be on the dock or wherever they could be secured (R. 42). The testimony was purely hypothetical as to what would be done in an emergency and the sources from which members of the crew would be secured. As sailors invariably hang around docks, that would be the natural place to find one, and the witness did not state that they were picked up "at random."

The Premises of Respondent's Brief Are Not Well Taken.

The brief of respondent is predicated throughout upon the premise that the issue of crew membership "should be regarded as one of fact" (Respondent's brief, p. 11).

This primary assumption is unsound.

The Court of Appeals held, as we contend, that "the facts are not in dispute" (R. 91). The Court of Appeals says that the single question in the case is whether or not "deceased was a seaman consistent with the undisputed facts" (R. 92).

As we view Respondent's brief, we believe counsel have themselves summed up their brief in two statements therein contained:

First. "In this view the question of what general standard must be applied in determining who is a 'member of a crew' would seem clearly to be a question to be decided by the courts. That is a question of law. It is the Government's position, however, that the application of the general standards laid down in

the decisions to the circumstances of individual cases should be treated as a question of fact for the determination of the deputy commissioner" (Respondent's brief, p. 12).

As the facts in the case at bar are entirely without dispute, the determination, whether such undisputed facts make the claim for compensation one over a claim of which the deputy commissioner has jurisdiction and power to make an award or not, must of necessity present a case on which the court has the power to reach a conclusion as a matter of law. To hold otherwise would be to say that there is a hypothetical power in the courts to review a case where the jurisdiction or power of the commissioner is challenged, but that in no case could the power of the courts be practically exercised.

Second. Counsel for respondent adopt the premise in their brief that a determination of the court under undisputed evidence that the deputy commissioner had no jurisdiction or power to make any award is, in effect, "substituting the judgment of the courts for that of the deputy commissioner" (Brief of Respondent, p. 36).

We respectfully submit that the issue is not one of substitution of judgment, for if the courts have the power to declare the standard to be applied in determining who is a member of a crew (Respondent's Brief, p. 12), then a determination under undisputed evidence whether or not a case falls within or without that standard is the province of a court not unlike the power to direct a verdict under undisputed evidence. In truth, the power of the court is greater on the issue here presented than here last mentioned, for we assert that the question goes to the existence of any power on the part of a deputy commissioner to make an award under undisputed facts and, therefore, the

question is one which, under the decisions, the court may independently examine under both the law and the facts.

"The Meaning of the Term 'Member of a Crew'".

(Respondent's Brief, pp. 12-15)

Respondent cites cases to the effect that sometimes the master is included and other times excluded from the ship's company when the term "crew" is employed (Respondent's brief, p. 13). Such differing uses of the term are not of importance in this case because the statute itself distinguishes between the master and members of a crew, excluding both from the operations of the Longshoremen's Act and, therefore, such otherwise possible confusion of terms is precluded by the language of the Act itself.

Respondent concedes that cooks, engineers, wireless operators or even bartenders may be members of the crew of a vessel (Respondent's brief, p. 14). These cases serve, in our judgment, to demonstrate that the test is *not the duties performed* by a person as a criterion for inclusion or exclusion from the ship's company, but the standard is his status, *i. e.* whether he is a part of the ship's company, the presence of whom is required to make it a vessel entitled to engage in its business.

But respondent says that there is a class of workers who fall in "the 'twilight' zone" (Respondent's brief, pp. 14-15).

Respondent cites language from the case of *Scheffler v. Moran Towing & Transportation Company*, 68 F. (2d) 11, which was directed exclusively to the point of assumption of risk by an employee of shorthandedness of a tug, and it is stated that exemption from assumption of risk because

unseaworthiness, although not available as against a seaman on the seas, is not an excuse to those "who, though strictly speaking they are seamen, are employed upon harbor craft." Nor does the exemption from assumption of risk apply in all cases to seamen on the high seas, for even to them the exemption "does not, however, excuse him when he has an alternative" (p. 12). It is obvious that the court in the case cited did not hold that deck hands on harbor craft were not seamen, but asserts that even though *they are seamen*, they, like those on the high seas when they have no alternative to living with the perils which confront them, are exempted from assumption of risk. The case is not authority for any contention that a seaman on a harbor craft is not a member of a crew of a vessel.

In the brief of respondent it is stated that "The principles governing the division of function of court and jury furnish a persuasive analogy" (Respondent's brief, p. 25 *seq.*). In this division of the brief of respondent, it is intended that whether a company of persons is a crew or not a crew of a vessel presents a question of fact. Quotation is made from *McLanahan v. Universal Ins. Co.*, 1 Pet. 10 (Brief of Respondent, p. 25). In that case the question of determination was stated by Mr. Justice Story (as quoted by respondent):

"What is a competent crew for the voyage?"

The competency of the crew resting in nautical testimony presents a problem entirely variant from that here presented, which is *membership* in a crew regardless of the abilities or aptitude of the members of the crew.

Respondent quotes at length from *Pearce v. Lansdowne*, L. J. R. (N. S.) (Q. B. Div. 1893) 441, and another part of opinion of the same case, 69 L. T. R. 316 (Brief of Respondent, pp. 25-26).

The facts in the case so cited are not completely stated by Respondent and we regard the following additional facts as of importance:

The action was under The Employers and Workmen Act, 1875, s. 10, which provided for compensation to a workman, the Act itself providing "the expression 'workman' does not include a domestic or menial servant, * * * " (p. 441, the first of two foregoing citations.)

It further appears from the statement of facts preceding the opinion in the foregoing case as respects the claimant: "He lived at his own house and went home three times a day for his meals. The defendant's residence was the public-house in question." (p. 441.)

The essence of the opinion is stated in the following quotation:

"However, under the present circumstances, where the Court feels that they have all the facts before them calculated to enable them to give judgment and finally settle the matter, such judgment may be properly given." (p. 443.)

Two questions were presented as to the claimant in that case whether he was a domestic servant and whether he was a menial servant. The question of whether he was a domestic servant did not turn upon whether he lived on the premises or resided elsewhere, although it might be important in other cases, and the Court stating that while it might be a material circumstance under some hypothetical cases, nevertheless:

"If my view of the present case is the right one, it appears to me that the personal residence of the defendant at his public-house is a cogent reason why a jury should decide that the plaintiff's employment

was that of a domestic servant. I think, too, that the facts show that the plaintiff was substantially occupied as a domestic."

So, in the case at bar, if the skill of Schumann, or the degree of his seamanship or his qualifications to perform the duties of an able seaman were involved in the decision, a different question would be presented.

All that the statute prescribes as a condition for exempting the employee from the right to assert compensation or the duty of the vessel to pay him compensation is that he be a "member of the crew of any vessel." It is undisputed that the Koal Kraft was a vessel; that she had a crew; that Schumann was one of that crew. Whether his duties were light or heavy, skillfully or unskillfully rendered are of no importance. As in *Pearce v. Landowne, supra*, it was said (p. 444):

"It seems plain, however, that the reason for their exclusion was in no way connected with the work they had to do, whether it were light or heavy, skilled or unskilled, but rather that where *relations* were of so domestic a nature as those which exist between a master and the servants of his household, servants standing in such a relationship to their employers were not to be included in its scope" (Italics ours).

So in the case at bar, it was the relationship of Schumann to the ship as a member of its crew that is the determining factor and not his skill or lack of it or the duties to which he might be assigned as a member of the ship's company.

**Cases under Longshoremen's Act Cited by Respondent Are
Not Authority against Our Position.**

(Brief for Respondent, pp. 22, 31)

Respondent cites three cases at p. 22 and one case at p. 31, arising under the Longshoremen's Act, having more or less pertineney to the issues here presented (Respondent's Brief, pp. 22, 31). These cases are cited to the point that "no rule of law has or can be evolved which will substantially eliminate uncertainty as to whether a person is a 'member of a crew'" (Respondent's Brief, p. 22). This statement must be read in conjunction with the statement by Respondent that the standards for determining who is a member of a crew "would seem clearly to be a question to be decided by the courts, that is, a question of law" (Respondent's Brief, p. 12).

In reviewing the four cases cited by respondent [*Lawson, Deputy Commissioner v. Maryland Casualty Co.*, 94 F. (2d) 193; *Diomede v. Lowe*, 87 F. (2d) 296; *De Wald v. Baltimore & O. R. Co.*, 71 F. (2d) 810; and *Moore Dry Dock Co. v. Pillsbury*, 100 F. (2d) 245], to make our discussion intelligible, it is appropriate and, we trust, helpful to the Court to recite the provisions of the statutes incidentally bearing on what is a vessel within the meaning of the statute and what is a crew within the general intent of the statute.

The steamer, Koal Kraft, was a vessel of 312 net tons burden, 159 feet in length, 37 feet beam, and 10 feet draft (R. 14). The Petitioner's original brief called attention to various statutes disclosing such a vessel was subject to inspection, certification and designation of make-up of its crew. We call attention to the following additional statutory requirements and classifications of vessels disclosing as we assert that the Koal Kraft was a vessel

within the statutory intent, whereas the vessels in the cases cited by respondent were not.

The provisions relating to measurement of vessels applies only to vessels required by law to be registered or enrolled or licensed. (Rev. Stat. 4152, U. S. C. A., Title 46, Sec. 76.)

A licensed vessel of the United States entitled to engage in the coasting trade is an enrolled vessel of twenty tons and upward, duly licensed, or a vessel of less than twenty tons having a license in force. (Rev. Stat. 4311, U. S. C. A., Title 46, Sec. 251.)

The provisions as to licensing and enrollment apply to vessels of more than twenty tons. Vessels between five tons and twenty tons burden are not required to be re-measured in the absence of changes since former measurement. (Rev. Stat. Sec. 4331, U. S. C. A., Title 46, Sec. 273.)

Provisions for registering, enrolling or licensing vessels are not applicable and the statute governing registry or enrollment or licensing do not apply to "the enrolling, registering or licensing of any flatboat, barge or like craft for the carriage of freight, not propelled by sail or by internal motive power of its own, on the rivers or lakes of the United States." (21 Stat. 44, U. S. C. A., Title 46, Sec. 332.)

"All vessels of above fifteen tons burden, carrying freight or passengers for hire, propelled by gas, fluid, naphtha or electric motors, are subject to all the provisions of Sec. 404 relating to the inspection of hulls and boilers and requiring engineers and pilots * * *." (29 Stat. 489, U. S. C. A., Title 46, Sec. 520.)

The last foregoing section is probably superseded by Rev. Stat., Sec. 4426, U. S. C. A., Title 46, Sec. 404, which

applies to canal boats, etc., "or other small craft of like character propelled by steam," in which it is provided that "no such vessel shall be navigated without a licensed engineer and a licensed pilot: *Provided, however,* That in open steam launches of ten gross tons and under, one person, if duly qualified, may serve in the double capacity of pilot and engineer." The same section provides that all vessels of the small type above fifteen gross tons carrying freight or passengers for hire, propelled by gas, fluid, naphtha, or electric motors, shall be subject to inspection of hulls and boilers.

The Great Lakes and tributary waters in the Lake Michigan area are expressly placed under jurisdiction of vessel inspectors, and the provisions as to enrolling and licensing such vessels extend to vessels enrolled to navigate in those waters. (44 Stat. 832, U. S. C. A., Title 46, Sec. 293b (1938 Cumulative Annual Pocket)).

In *Lawson, Deputy Commissioner v. Maryland Casualty Co.*, 94 F. (2d) 193, the vessel was a rowboat less than 16 feet long, propelled by one oar at its stern, and the Court properly held that it was not a vessel within the intent of the Act (p. 194). It was further held that the skiff was not a vessel and that the dredge in connection with which it worked was not a vessel to which the deceased was so assigned as to be a member of its crew, as he worked primarily under the direction of a labor foreman on land (p. 194).

In the case of *Diomede v. Lowe, Deputy Commissioner*, 87 F. (2d) 296, the supposed vessel was a dump scow "without means of self-propulsion" (p. 297), it had no ship's company but "the decedent was the only person working on the scow" (p. 297) and being the only person on the ship, there was no crew in any proper or legal sense.

In *De Wald v. Baltimore & O. R. Co.*, 71 F. (2d) 810, the deceased was employed on a barge having no motive power (p. 811). He was the only person employed on it and the court held that he was not a member of the crew because the term "crew" is a collective noun" and implies more than one person (p. 813). The court might well have held that the barge was not a vessel had its attention been called to the statutes which we have noted above. No decision on this point was made by the court.

In *Moore Dry Dock Co. v. Pillsbury*, 100 F. (2d) 245, the vessel involved was a launch not described as to size or tonnage (p. 245). Its supposed crew, other than its captain, consisted of the decedent alone (p. 245). Not only was he not a member of a ship's company because he was the sole person on her but furthermore he was not employed by or under the direction of the captain of the launch, but worked under shore officials of the dry dock company (p. 247). It may be fairly be said that the launch in question was not shown to be a vessel and that the deceased was not a member of a ship's company.

The foregoing are the only cases cited by respondent apparently asserted as arising under this Act in throwing any special light on the questions here involved.

We respectfully submit that none of the cases cited is any authority against our contentions. Respondent is forced by necessity to the position either that the Koal Kraft was not a vessel of the United States or that the persons forming the ship's company on her were not a ship's crew. That the Koal Kraft was a vessel of the United States is not only undisputed on this record but was expressly stipulated (R. 61). Her size and tonnage were proven (R. 14); the membership of her crew was prescribed by vessel inspectors and included "3 seamen" of whom the deceased was one (R. 65). It is uncontra-

dicted and so noted in the opinion of the Court of Appeals that the necessary ship's company would not exist unless Schumann were included (R. 91) and the only point of distinction the Court of Appeals could make was that the designation of this crew in the inspection certificates (it was said) had a different significance and connotation than is used in the statutory exception (R. 91).

Respondent is relegated to the position that one performing the duties of Schumann would be a member of the crew if the vessel traveled from Illinois to Michigan but that he would not be a member of the crew when traveling from Illinois to Indiana or in the Indiana harbor; the vessel being engaged in commerce, enrolled, and having its crew prescribed by law, the accidental fact that the vessel traveled to the port of another state or remained in the harbor is not any point of distinction made by the statute which exempts every master and every member of a crew of a vessel. If the logic of the Court of Appeals were to be pursued it would mean that the master likewise was subject to the Compensation Act for he likewise remained on this vessel only while in Illinois water or traveling between Illinois and the adjoining state of Indiana. It cannot be true that when he navigated the vessel in Calumet Harbor he was not a master of a vessel but that if he navigated the same vessel to St. Joseph, Michigan—only a few hours distant—he would then rise to the dignity of a master of a vessel merely because his vessel touched a different port. At one time he would supposedly be under the Compensation Act and at another time he would not be. If he were injured at one time he would recover compensation, if injured at another time, he would not. The standard must necessarily be that a person who becomes so identified with the ship that he and the others associated with him perform the functions of operating it and are

subject only to the will of the master of that ship are members of the crew of the vessel while the vessel is engaged in commerce, and their category as members of the crew is fixed by their relationship to the ship, which does not change so as to come within the Compensation Act or without the Act dependent upon the ship preceding a few miles more or a few miles less upon its trips. It is the identity of a person with a ship so that he is a part of it like its anchor, its sails, etc., which makes him a member of the crew. Whether the duties he performs are heavy or light, skilled or unskilled, whether he be waiter, bartender, fireman or deck hand, he is a member of the crew if his presence is one of the necessities of operating the ship in whatever activity on the water the ship be engaged.

The Court should not become confused by cases of watchmen, etc. upon ships out of commission, for they by, reason of want of a crew etc. become mere hulls and unfit to run as if a sailing vessel were moored and had no sails aboard by which it might be sailed.

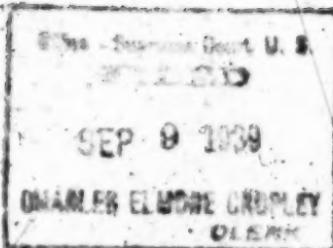
We respectfully submit that this case permits only one conclusion upon undisputed facts, that the decree of the District Court ought to stand and the reversal by the Circuit Court of Appeals should be set aside.

Respectfully submitted,

ROBERT J. FOLONIE,
HAYES MCKINNEY,
Counsel for Petitioners.



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No. 262

In the Supreme Court of the United States

OCTOBER TERM, 1939

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD., PETITIONERS

v.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION



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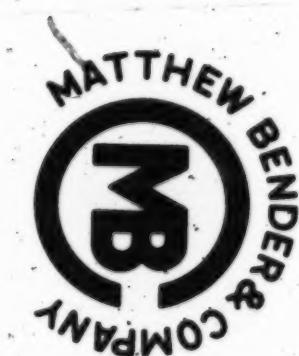
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OPINIONS BELOW

The District Court did not write an opinion. Its decree appears at R. 71-72. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 84-92) is reported in 104 F. (2d) 522.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered on May 11, 1939 (R. 92). A petition for rehearing was denied on June 6, 1939 (R. 109). The petition for a writ of certiorari was filed on August 4, 1939. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the employee here involved was a member of a crew and so not covered by the Longshoremen's and Harbor Workers' Compensation Act.
2. Whether the above question was one upon which the determination of the Deputy Commissioner was conclusive if supported by evidence, or was for the determination of the District Court *de novo*.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act (c. 509, 44 Stat. 1424; U. S. C., Tit. 33, § 901 ff.) are set forth in the Appendix, *infra*, pp. 12-13.

STATEMENT

John Schumann was drowned on October 31, 1937, while engaged in his duties as an employee of petitioner, South Chicago Coal & Dock Company,

on a vessel, "Koal Kraft," which at that time was in the navigable waters of the United States (R. 6, 9, 14, 15, 40).

The boat was a lighter, used for fueling steamships and other marine equipment in the Calumet River and Harbor and in the Indiana River and Harbor (R. 13). The boat had a captain, an engineer, a fireman, and three "deck hands" (R. 15). This complement was required by its Certificate of Inspection (R. 65-67; 41-42), so that whenever one of the men failed to show up, he would be replaced by someone picked up at random (R. 42). The activity of the boat was seasonal, lasting about eight months a year (R. 36). The men who worked on it came in as laborers and acquired experience as they went along (R. 19).

Schumann, who had had no previous experience with boats (R. 27), began work on the "Koal Kraft" on October 5, 1937 (R. 18). It was an "on and off" job (R. 26). He had signed no papers or "articles" (R. 18). His working hours, whenever he worked, ranged from eight to twelve hours a day (R. 17), averaging somewhat over ten hours each day (R. 23). He was paid at the rate of sixty cents an hour (R. 23).

His work on the boat is variously described. He handled lines on mooring the boat at the dock and on leaving the dock (R. 16). When the lighter arrived at the ship to be coaled, he threw a heaving line to the deck of that ship (R. 22). While the

boat was discharging the coal, he kept the coal running by prodding it down the chute with a long pole (R. 20, 35, 40). This was his main duty (R. 38-40). He did general deck work (R. 16), such as cleaning up spilled coal (R. 58), helping to scrub the deck (R. 35), and, as an accommodation to the fireman, helping with that work (R. 38). Although a deckhand's work on a boat involved "general labor, keeping it clean, handling the lines, painting or whatever you ask him to do" (R. 18, 40), Schumann had not done any painting or scrubbing, since that work was done in the summer and he did not begin working until October (R. 40). His only act of seamanship was throwing a heaving line (R. 21).

Schumann had no duties while the boat was under way from the time it left the dock to the time when it reached its destination (R. 22, 53). He did not aid in the navigation of the boat (R. 20, 38, 52, 55).

The "Koal.Kraft" had no quarters in which anyone could stay (R. 17), nor were any meals available on the boat (R. 53). Schumann never slept on the boat (R. 39). He stayed at home and waited for telephone calls directing him to report to work whenever he was needed (R. 20, 25-26, 39).

On the date of his death the boat was proceeding from its dock at 95th Street on the Calumet River to a steamship about a mile away (R. 53). He was last seen alive a short while after the boat had begun moving (R. 37). His disappearance was reported to the captain when the boat arrived at its destination (R. 50). Later his body was found in the river (R. 50).

Schumann's wife and daughter filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 43). Upon the facts stated above the Deputy Commissioner found that on the date of his death Schumann was an employee of the South Chicago Coal & Dock Company and that on that date, while performing services for his employer as a laborer on the barge "Koal Kraft," he fell from the barge into the river and was drowned (R. 43-44).¹ An award was made (R. 44).

Thereupon, the petitioners filed a bill for injunction in the United States District Court for the Northern District of Illinois, Eastern Division, praying that the compensation order be set aside, and that a finding be made that Schumann was a member of the crew and that the claim was therefore not within the provisions of the Act (R. 2-5).

Upon the hearing before the District Court substantially the same evidence was introduced which had been introduced before the Deputy Commissioner (R. 47-68). The record of the hearings before the Deputy Commissioner (R. 8-42) was included in the record before the District Court (R. 60, 61).

With this record before it, the District Court found as a fact that at the time of his death Schu-

¹ The Deputy Commissioner stated in his finding of fact that when Schumann fell from the barge it was "moored" (R. 43). This is apparently an error, but since there is no dispute that the barge was on navigable waters, it is a harmless error.

mann was a member of the crew of the vessel and therefore not within the coverage of the Act (R. 71). Accordingly it entered a decree permanently enjoining the enforcement of the compensation award (R. 71-72). On appeal, the Circuit Court of Appeals for the Seventh Circuit reversed. It held that the Deputy Commissioner's finding that Schumann was not a member of the crew was conclusive if supported by evidence and could not be reviewed *de novo* by the District Court (R. 87-89) and that the Deputy Commissioner's finding was supported by evidence (R. 89-91). It further held that even if the question were one for the determination of the District Court *de novo*, it would reverse the District Court because the undisputed evidence established that Schumann was not a member of a crew (R. 91-92).

ARGUMENT

1. If Schumann was a member of the crew of the "Koal Kraft," he was not covered by the Longshoremen's and Harbor Workers' Act, being specifically excluded therefrom by Sections 2 and 3 of the Act, *infra*, p. 12. Petitioners contend that Schumann was a member of the crew, and that the holding of the court below to the contrary is in conflict with the decisions in *Ellis v. United States*, 206 U. S. 246; *Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190 (C. C. A. 5th); and *Kibadeaux v. Standard Dredging Co.*, 81 F. (2d) 670 (C. C. A. 5th), certiorari denied, 299 U. S. 549.

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Whether an employee is a member of a crew within the excluding provision of the Longshoremen's and Harbor Workers' Act depends in each case upon the particular circumstances of the employment. The employee in this case had not signed any articles (R. 18). He was paid by the hour (R. 23). His main duty was to keep the coal running while the lighter was discharging (R. 38-40). He had no duties while the boat was in motion, from the time it left the dock until it reached the ship to be fueled (R. 22, 53). He had nothing to do with the navigation of the boat (R. 38, 52, 55). The boat had no quarters in which he could stay, nor were any meals available on board (R. 17, 53). He never slept on the boat (R. 39), and worked only when he was ordered by telephone to report for work (R. 20, 25, 26, 29).

The cases cited by petitioners are not in conflict with the holding of the court below that upon these facts the employee was not a member of a crew. In *Maryland Casualty Co. v. Lawson*, the employer was "fed and quartered" aboard the boat, assisted in its navigation, and was "permanently attached" to the boat "as a member of the ship's company" (94 F. (2d) at 192-193). Similarly, in *Kibodeaux v. Standard Dredging Co.*, the employee was "permanently employed on the vessel and quartered there" and was "under duty to aid in navigating her" (81 F. (2d) at 673). *Ellis v. United States* did not deal with the Longshoremen's and Harbor worker's Act at all. The Court there held (206

U. S. 260) that persons employed upon dredges and scows in dredging a harbor were not "laborers or mechanics . . . employed . . . upon any of the public works" of the United States, within the meaning of a statute fixing maximum hours of labor for such laborers and mechanics. In the course of the opinion the Court said that employees upon dredges and scows fell into the category of seamen as defined by an earlier statute—R. S., Sec. 4612. But Congress specifically determined not to use the definition of seamen in R. S., Sec. 4612, to define what employees were excluded from the Longshoremen's and Harbor Workers' Act. See 68 Cong. Rec., 5402-5403.

The decisions cited by petitioners are thus not in conflict with the decision below. On the other hand, that decision below is supported by the decisions in *Diomede v. Lowe*, 87 F. (2d) 296 (C. C. A. 2d), certiorari denied, sub nom. *Moran Brothers Contracting Co., Inc., v. Diomede*, 301 U. S. 682; *Lawson v. Maryland Casualty Co.*, 94 F. (2d) 193 (C. C. A. 5th) (not to be confused with *Maryland Casualty Co. v. Lawson, supra*); and *Moore Dry Dock Co. v. Pillsbury*, 100 F. (2d) 245 (C. C. A. 9th).²

² The designation of the statute as "Longshoremen's and Harbor Workers' Compensation Act" draws attention to the fact that there is a distinction between longshoremen, who ordinarily work on and about docks, harbor workers, who work in and about a harbor, and seamen, who are not covered by this Act. The employee in the present case plainly was in the second category. Cf. *Diomede v. Lowe, supra*.

2. Petitioners urge also that the question whether the employee was a member of the crew was jurisdictional and that, therefore, the determination of the Deputy Commissioner that he was not and was entitled to the benefits of the Act was reviewable *de novo* by the District Court. In support of this contention petitioners rely upon *Crowell v. Benson*, 285 U. S. 22, and *Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190 (C. C. A, 5th) (Br., pp. 15-19).

In the *Benson* case this Court held that while a determination of a deputy commissioner with respect to an ordinary question of fact arising under the Act was conclusive if supported by evidence, that the district court was entitled to determine *de novo* the so-called fundamental or "jurisdictional" facts, the existence of which is a condition precedent to the constitutional application of the statute. These "jurisdictional" requirements were enumerated as: (a) That the injury occur upon the navigable waters of the United States, and (b) that the relation of master and servant exist (285 U. S. at pp. 37-38, 54-55, 63-68). No other "jurisdictional" limitation upon the finality of a deputy commissioner's findings (if supported by evidence) was suggested.³ And the Court recognized that it

³ The Court said (pp. 64-65): "The argument is made that there are other facts besides the locality of the injury and the fact of employment which condition the action of the deputy commissioner. That contention in any aspect could not avail to change the result in the instant case. But we think that there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for

was essential to the prompt and inexpensive procedure contemplated by the Act that all factual determinations by deputy commissioners other than those dealing with the enumerated jurisdictional facts be conclusive if supported by evidence (285 U. S. at 46, 47). Thus there is no conflict between the decision below and *Crowell v. Benson*.

In the *Maryland Casualty* case the Circuit Court of Appeals for the Fifth Circuit stated, without discussion, that whether an employee was a "member of the crew" was a jurisdictional question on which the finding of the deputy commissioner was not conclusive. Since it does not appear that the question was contested or carefully considered in the *Maryland Casualty* case, it is submitted that no conflict warranting certiorari exists, especially since the court below thoroughly reexamined the evidence and reached the conclusion that, even if a trial *de novo* was proper, the finding of the District Court was erroneous, and that of the deputy commissioner correct.

the imposition of liability without fault, and those cases which fall within the admiralty and maritime jurisdiction and where the relation of master and servant in maritime employment exists. It is in the latter field that * * * the determination of the facts relating to the circumstances of the injuries received, as well as their nature and consequences, may appropriately be subjected to the scheme of administration for which the Act provides."

The constitutional problems discussed in the *Benson* case are plainly absent in this case.

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CONCLUSION

The decision of the court below is correct. No conflict warranting certiorari is presented. We respectfully submit that the petition should be denied.

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Solicitor General.

FRANCIS M. SHEA,
Assistant Attorney General.

✓ PAUL A. SWEENEY,
Special Assistant to the Attorney General.

✓ THOMAS HARRIS,
✓ AARON B. HOLMAN,
Attorneys.

SEPTEMBER 1939.

APPENDIX

The relevant sections of the Longshoremen's and Harbor Workers' Compensation Act (C. 509, 44 Stat. 1424, 1425, 1426, 1435, 1436) are:

SEC. 2. When used in this Act—

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the wilful

intention of the employee to injure or kill himself or another.

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 262

**SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS
CORPORATION, AND LONDON GUARANTEE & ACCIDENT
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v.

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10TH COMPENSATION DISTRICT**

**ON PETITION FOR A WRIT OF CERTIORARI, TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT**

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 262

SOUTH CHICAGO COAL & DOCK COMPANY, AN ILLINOIS CORPORATION, AND LONDON GUARANTEE & ACCIDENT COMPANY, LTD., PETITIONERS

v.

HARRY W. BASSETT, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, 10TH COMPENSATION DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The District Court did not write an opinion. Its decree appears at R. 71-72. The opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 84-92) is reported in 104 F. (2d) 522.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was entered on May 11, 1939 (R. 92). A petition for rehearing was denied on June 6, 1939 (R. 109). The petition for a writ of certi-

orari was filed on August 4, 1939, and was granted October 9, 1939. The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, in a proceeding under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act to enjoin the enforcement of a compensation order, the finding of the Deputy Commissioner that the deceased was not a member of a crew (and so within the scope of the Act) is conclusive if supported by substantial evidence.
2. Whether in the present case the finding of the Deputy Commissioner that the deceased was not a member of a crew was supported by substantial evidence.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424; 33 U. S. C. and U. S. C. Supp. IV, Sec. 901 ff., are set forth in the Appendix, *infra*, pp. 38-47.

STATEMENT

John Schumann was drowned on October 31, 1937, while engaged in his duties as an employee of petitioner South Chicago Coal & Dock Company, on a vessel, "Koal Kraft." At the time of the accident, the vessel was in the navigable waters of the United States (R. 6, 14, 15, 40).

The boat was a lighter, used for fueling steamships and other marine equipment in the Calumet River and Harbor and in the Indiana River and Harbor (R. 13).

The boat was manned by a captain, an engineer, a fireman, and three "deck hands" (R. 15), as required by its certificate of inspection (R. 41-42). Whenever one of the men failed to show up he would be replaced by someone picked up at random (R. 42). The activity of the boat was seasonal, lasting about eight months a year (R. 36). The men who worked on the vessel began as laborers and acquired experience as they went along (R. 19). All of them were hired by the master (R. 16).

Schumann, who had had no previous experience with boats (R. 27), began work on the "Koal Kraft" on October 5, 1937 (R. 18), and continued in this employment until his death twenty-six days later (R. 18). It was an "on and off" job (R. 26). He signed no papers or "articles" (R. 18). His working hours, whenever he worked, ranged from eight to twelve hours a day (R. 17), averaging somewhat over ten hours each day (R. 23). He was paid at the rate of sixty cents an hour (R. 23).

His duties are variously described in the record. He handled lines on mooring the boat at the dock and on leaving the dock (R. 16). When the lighter arrived at the ship to be coaled, he threw a heaving line to the deck of that ship (R. 22). While the lighter was discharging the coal, he kept the coal running by prodding it down the chute with a long pole (R. 20, 35, 40). This was his main duty (R. 38-40). He did general deck work (R. 16), such as helping to scrub the deck (R. 35), and as an accommodation to the fireman helped with his work (R. 38). Although a deck-hand's work on a boat involves "general labor, keeping it clean, handling the lines, painting or whatever you ask him to do" (R. 18, 40),

Schumann had done no painting, since that work was done in the summer and he did not begin work until October (R. 40).

Schumann had no duties while the boat was under way from the time it left the dock to the time when it reached its destination (R. 22). He did not aid in the navigation of the boat (R. 20, 38). His only act of "seamanship" was throwing a heaving line (R. 21).

No sleeping quarters were provided on the "Koal Kraft" (R. 17), and Schumann never slept on the boat (R. 39). He stayed at home and waited for telephone calls directing him to report to work whenever he was needed (R. 20, 25-26, 39).

Schumann was drowned on October 31, 1937. He was last seen alive a short while after the boat had begun moving (R. 37), but the exact circumstances of his death are not explained in the record and are apparently unknown (R. 9). Schumann's wife and daughter filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 6-7, 43). Upon the facts stated above, the Deputy Commissioner found that on the date of his death Schumann was an employee of the South Chicago Coal & Dock Company and that on that date, while performing services for his employer as a laborer on the barge "Koal Kraft," he fell from the barge into the river and was drowned (R. 43-44). An award was made (R. 44).

The Deputy Commissioner stated in his finding of fact that when Schumann fell from the barge it was "moored" (R. 43). This is apparently an error, but since there is no dispute that the barge was on navigable waters, it is a harmless error.

Thereupon, the petitioners filed a bill for injunction in the United States District Court for the Northern District of Illinois, Eastern Division, praying that the compensation order be set aside, upon the ground that Schumann was a "member of a crew" within the meaning of Sections 2 and 3 of the Act, and that the claim was therefore not within the provisions of the Act (R. 2-5).

The District Court granted a trial *de novo* on the question whether deceased was a member of a crew. Upon the hearing substantially the same evidence was introduced which had been introduced before the Deputy Commissioner (R. 47-68). The record of the hearings before the Deputy Commissioner (R. 8-42) was included in the record before the District Court (R. 60, 61).

The District Court found as a fact that at the time of his death Schumann was a member of a crew of a vessel and therefore not within the coverage of the Act (R. 71). Accordingly, it entered a decree permanently enjoining the enforcement of the compensation award (R. 71-72). On appeal, the Circuit Court of Appeals for the Seventh Circuit reversed. It held that the Deputy Commissioner's finding that Schumann was not a member of a crew was conclusive if supported by evidence and could not be reviewed *de novo* by the District Court (R. 87-89) and that the Deputy Commissioner's finding was supported by evidence (R. 89-91). It further held that, even if the question were one for the determination of the District Court *de novo*,

the judgment of the District Court should be reversed because the undisputed evidence established that Schumann was not a member of a crew (R. 91-92).

SUMMARY OF ARGUMENT

I

The question whether the deceased was a "member of a crew" was one for the determination of the Deputy Commissioner under the express language of the Act, and his findings of fact are conclusive if supported by substantial evidence in the record before him. The District Court was not empowered to try this issue *de novo* or to make an independent determination of the facts. The decision in *Crowell v. Benson*, 285 U. S. 22, has no application for the reason that "no constitutional question is presented" (*Shields v. Utah Idaho Central R. R. Co.*, 305 U. S. 177, 184).

II

The ultimate finding of the Deputy Commissioner that the deceased was not a member of a crew is supported by substantial evidence and the compensation order issued pursuant thereto was made in accordance with law. The facts in the case, though not disputed, give rise to conflicting inferences, and the standards for determining who is a member of a "crew," familiar as they are in the maritime law, are nonetheless too general to be applied to the circumstances of a particular case with any degree of certainty. This the decisions defining the term "member of a crew" abundantly illustrate.

The question presented is one which for want of a better term has sometimes been described as a "mixed question of fact and law." A consideration of common law doctrine, of the scope of review in the case of other administrative agencies, and of the purpose of the Longshoremen's Act, forcibly suggests that the determination of the Deputy Commissioner on this question should be given finality when supported by substantial evidence. The substitution of the judgment of the courts for that of the Deputy Commissioner on the question whether the claim is within the statute would invite futile and expensive litigation and thus defeat the purpose of the Act to achieve "prompt" and "inexpensive" disposition of compensation claims. No rule of law has been evolved sufficiently definite in its application to permit such "prompt" and "inexpensive" disposition by the courts. A review of the decisions arising under this and similar statutes is persuasive that no such rule can be evolved.

The Government, it should be noted, does not contend that the deputy commissioner is better qualified than the courts to pass on the question presented. No social or economic issue of great complexity is involved which would require special training for solution. It is our position, however, that the question is one as to which reasonable men may well disagree. In such circumstances nothing is to be gained by denying finality to the determination of the deputy commissioner, and the purpose of the Act may thereby be defeated.

ARGUMENT

I

THE FINDING OF THE DEPUTY COMMISSIONER THAT THE DECEASED WAS NOT A "MEMBER OF A CREW," IF REGARDED AS A FINDING OF FACT, WAS CONCLUSIVE IF SUPPORTED BY SUBSTANTIAL EVIDENCE

The District Court granted petitioner a trial *de novo* on the question whether deceased was "a member of a crew" at the time of the injury, and found that he was, ignoring the contrary finding of the Deputy Commissioner. The court below held that the determination of the Deputy Commissioner upon the question was conclusive if supported by substantial evidence, and that it was so supported. Assuming what we will hereafter attempt to establish, that the finding of the Deputy Commissioner should be regarded as one of fact rather than as one of law, the holding of the court below that the finding was conclusive if supported by substantial evidence is in plain accord with the valid provisions of the Act.

Section 2 (3) of the Longshoremen's and Harbor Workers' Compensation Act provides that the term "employee" as used in the Act does not include a "master or member of a crew of any vessel * * *" and the question whether deceased was a member of a crew, if regarded as one of fact, was for the determination of the Deputy Commissioner. Section 3 (a) (1) provides that no compensation shall be payable in respect of the disability or death of "a master or member of a crew of any vessel, * * *." Section 19 of the Act, in providing for the filing of a "claim for compensation," expressly declares that "the deputy commissioner shall

have full power and authority to hear and determine all questions in respect of such claim." Section 21 (b) provides that a compensation order may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law, * * *." By this section the review of the courts is plainly limited to questions of law, including, of course, the question whether the Deputy Commissioner's findings of fact are supported by substantial evidence. Cf. *Voehl v. Indemnity Ins. Co.*, 288 U. S. 162, 166, 169. The legislative history indicates that Congress intended to so limit review of the Deputy Commissioner's findings.² This Court has so construed similar statutory language providing for judicial review of decisions of the Board of Tax Appeals. *Phillips v. Commissioner*, 283 U. S. 589, 599-600; *Helvering v. Rankin*, 295 U. S. 123, 131; *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37; *Helvering v. National Grocery Co.*, 304 U. S. 282, 294.

Crowell v. Benson, 285 U. S. 22, does not require judicial review *de novo* of a determination whether a person is a member of a crew. In that case this Court held that the Act is not constitutional save where (a) the injury occurs upon navigable waters of the United States, and (b) the relationship of employer and employee exists at the time of the injury; that these limitations are "jurisdictional"; and that the statute must be construed to permit an independent judicial determination of the facts bearing on these two questions of constitutional jurisdiction in order to avoid grave doubts as to its constitutionality. So long, however, as

² See opinion of Mr. Justice Brandeis, dissenting, in *Crowell v. Benson*, 285 U. S. 22, at 72-73.

the injury occurs upon navigable waters and the relation of employer and employee exists Congress can in its discretion include or exclude "members of a crew" from the coverage of a particular statute. See *Nogueira v. New York, N. H. & H. R. Co.*, 281 U. S. 128, 136. It can therefore leave to the determination of an administrative body the question whether any particular case is within the statutory exception.

In *Shields v. Utah Idaho Central R. R. Co.*, 305 U. S. 177, this Court had before it a determination of the Interstate Commerce Commission that a carrier was not an interurban electric railway within the provision of the Railway Labor Act excluding such railways from the scope of that Act. The Court said (305 U. S. at 180):

As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive. * * *

And later the Court said (305 U. S. at 184-185):

As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions with respect to a trial *de novo* so far as the character of the respondent is concerned. * * *

* At this point the Court cited *Crowell v. Benson* and other cases in a footnote.

Accordingly the Court held that the determination by the Commission of the character of the railroad was conclusive, if not arbitrary and capricious, and if in accord with law, and that "That question must be determined upon the evidence produced before the Commission" (305 U. S. at 185).⁴

II

THE FINDING OF THE DEPUTY COMMISSIONER THAT THE DECEASED WAS NOT A MEMBER OF A CREW AT THE TIME OF THE INJURY SHOULD BE REGARDED AS ONE OF FACT AND WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

It is not enough, of course, to show that the determinations of the Deputy Commissioner on questions of fact are conclusive if supported by substantial evidence. As we have seen, Section 21 (b) of the Act, in providing that compensation orders may be set aside if not "in accordance with law," expressly reserves to the courts the determination of questions of law. This language of Section 21 (b) should be construed against the background of decisions in related fields, and with particular

⁴ The record in the present case does not disclose that the respondent objected to the taking of additional evidence by the District Court. In his Brief filed with the Circuit Court of Appeals the respondent asserted that such an objection was made, although this assertion was contradicted in the brief of the petitioners. The court below considered that the question was before it and passed upon it, as indeed it should have done on its own motion. Cf. *Twist v. Prairie Oil Co.*, 274 U. S. 684, 690; *Petroleum Co. v. Commission*, 304 U. S. 209, 216. Contrary to the assertion of the petitioner, the respondent assigned error to the District Court's substitution of its own findings for those of the deputy commissioner, including the finding that the deceased was not a member of the crew (R. 74).

reference to the controlling purpose of the Act as a whole. In this view the question of what general standard must be applied in determining who is a "member of a crew" would seem clearly to be a question to be decided by the courts, that is, a question of law. It is the Government's position, however, that the application of the general standards laid down in the decisions to the circumstances of individual cases should be treated as a question of fact for the determination of the Deputy Commissioner.

A. THE MEANING OF THE TERM "MEMBER OF A CREW"

The Act as originally drafted extended to all employees engaged in "maritime employment," but the bill was amended to exempt "seamen" from its operation in response to the request of the seamen's representatives.³ See *Nogueira v. New York, N. H. & H. R. Co.*, 281 U. S. 128, 136. The phrase "master and members of the crew" was substituted for the word "seamen," no doubt for the reason that this Court has defined the word "seamen" for the purposes of the Jones Act to include the very longshoremen and stevedores intended to be covered by the Longshoremen's and Harbor Workers' Compensation Act. *International Stevedoring Co. v. Haverty*, 272 U. S. 50; 68 Cong. Rec. 5402-5403.

The legislative history thus indicates plainly enough that the phrase "member of a crew" comprehends a

³ Seamen retain their rights under the maritime law and the right of election under the Jones Act, c. 250, 41 Stat. 988, 1007. 46 U. S. C. Sec. 688, to bring an action under the Federal Employers' Liability Act.

narrower class than the word "seamen," but beyond this it sheds no light on the scope of the exception. Reference must, therefore, be made to judicial definitions of this term in the maritime law and especially under the Longshoremen's Act.

Judicial definitions of the term "member of a crew."—This Court has observed the wide "range of variation" in the use of the word "crew." *Warner v. Goltra*, 293 U. S. 155, 158. It is, for example, "sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to comprehend the common seamen only, excluding the master and officers." *United States v. Winn*, 3 Sumn. 209, 213-214, Fed. Cases No. 16740 (Story, J.) (C. C. D. Mass.). Under the express language of the Longshoremen's Act all members of the ship's company are included, but many questions remain as to which the definitions laid down in the decisions provide only a general guide.

In the often-quoted opinion of Mr. Justice Story, in *United States v. Winn*, *supra*, at 219, the words "master, and crew" were held to include "all persons on board constituting the ship's company." This concept was enlarged-upon in *The Bound Brook*, 146 Fed. 160, 164 (D. Mass.) where it was said that "when the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board", a definition approved in *The Buena Ventura*, 243 Fed. 797, 799 (Hough, J.) (S. D. N. Y.). These three deci-

sions, and especially the language above quoted therefrom have been the principal reliance of the cases interpreting Section 3 of this Act. Some courts, however, have added the suggestion that Congress intended to exclude from the coverage of the Act only "seafaring men" subjected to the "perils of the sea." See *De Wald v. Baltimore & O. R. Co.*, 71 F. (2d) 810, 812, 813 (C. C. A. 4th), certiorari denied, 293 U. S. 581; *Moore Dry Dock Co. v. Pillsbury*, 100 F. (2d) 245, 246 (C. C. A. 9th); *Diomede v. Lowe*, 87 F. (2d) 296, 298 (C. C. A. 2d).

The classes definitely included or excluded.—In certain groups of cases whether the Act applies is reasonably certain. Thus it is now clear that any "permanent" member of the ship's company living on board and accompanying the ship on its voyages is a "member of the crew" even though he is a doctor, a cook, an engineer, wireless operator, or even a bartender. *The Buena Ventura, supra*; *The J. S. Warden*, 175 Fed. 314 (S. D. N. Y.); *Lawrence v. Flatboat*, 84 Fed. 200 (S. D. Ala.) affirmed on opinion below, 86 Fed. 907 (C. C. A. 5th); *The Ole Oleson*, 20 Fed. 384 (C. C. E. D. Wise.). In view of the express purpose of the Act, it is likewise clear that longshoremen and repairmen living on land and locally employed by stevedores and contractors to load, unload, or repair any vessel as their orders require, are not "members of a crew." See Hearing before the Subcommittee of the Senate Committee on the Judiciary on S. 3170, March 16 to April 2, 1936, 69th Cong., 1st Sess., pp. 19-21, 25-26.

The "twilight" zone.—There remains a class of workers, illustrated by the case at bar, who, "though

strictly speaking they are seamen, are employed upon harbor craft, on which they serve only during the day, leaving each night to go home, and renewing their work every morning, like any shore workmen. Such men are in the position of longshoremen or other casual workers on the water." *Scheffler v. Moran Towing & Transportation Co.*, 68 F. (2d) 11, 12 (L. Hand, J.) (C. C. A. 2d). Cf. *The John B. Lyon*, 33 Fed. 184, 186-187 (N. D. Ill.).

B. THE FINDING OF THE DEPUTY COMMISSIONER APPLYING THE LEGAL CRITERIA IN THE CASE AT BAR IS A REASONABLE, EVEN IF NOT THE ONLY RATIONAL, CONCLUSION

The general standards laid down in the decisions do not clearly reveal whether the deceased in the present case should or should not be classed as a member of a crew. For, though the facts are not disputed, the inferences to be drawn from them are conflicting. On the one hand the facts that the deceased served only during the day on an hourly basis, going home each night and returning to work every morning if called, that his duties were principally to load and unload coal, that he had no duties while the boat was in motion, that his only act of "seamanship" was throwing a heaving line, all point to the conclusion that he was not a "member of a crew" within the meaning of the Act. On the other hand, the fact that the deceased was employed by the master of the boat, that he was designated as one of three "deck-hands" required by the certificate of the Bureau of Navigation and Steamboat Inspection, that his services were performed while on the boat and included some comparable to those performed by ordinary seamen, point in the other direction. And while

the facts tend to give rise to conflicting inferences, no one of them is conclusive on the ultimate issue.

Petitioners stress the fact that the deceased was employed by the master of the vessel to whom he owed a duty of obedience. But the employment test is inconclusive. Shipowners not uncommonly employ their own longshoremen. In doubtful cases something may turn on whether the hiring is done by a land foreman or by the master. Cf. *Lawson v. Maryland Casualty Co.*, 94 F. (2d) 193, 194 (C. C. A. 5th); *Kraft v. A. H. Bull S. S. Co.*, 28 F. Supp. 437 (S. D. N. Y.); *Taylor v. McManigal*, 89 F. (2d) 583, 585 (C. C. A. 6th). But employment by the master is not necessarily conclusive that the employee was a member of the crew. The language of Section 3, excepting persons employed by the master "to load or unload or repair any small vessel under eighteen tons net" plainly evidences the intention of Congress to include some persons employed by the master for work on vessels of more than 18 tons. A master has authority to hire repairmen or stevedores in a wide variety of circumstances. See *Robinson on Admiralty*, 1939, 373-379; 390-394; 46 U. S. C. Secs. 971-973. In short, the coverage of the Act cannot be made to depend on the fortuitous circumstance whether the employee was hired by the master. Cf. *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 52; *Taylor v. McManigal*, 89 F. (2d) 583; *Southern Pacific Co. v. Locke*, 1 F. Supp. 992 (S. D. N. Y.); *Am. 1444*.

The petitioner appears to suggest that the duty of "obedience" to a superior officer on board ship rather than the circumstance of employment may be the test. But this test is likewise inconclusive. Where one is

injured in preparing a vessel for a winter tie-up, for example, it should be immaterial that he was acting under orders of the chief engineer of the vessel. Cf. *Taylor v. McManigal*, *supra*. A workman engaged in the "triple capacity of seaman, stevedore, and fisherman" and injured when unloading cargo at a port of call should not be excluded from the coverage of the Act merely because ordered into the hold of the vessel by the master. But cf. *De Luca v. Red Salmon Canning Co.*, 2 Cal. App. (2d) 124, 126. And a workman hired as a longshoreman does not become a "member of a crew" while performing special duties assisting the crew of a lighter in shifting a vessel in the harbor. Cf. *Southern Pacific Co. v. Locke*, 1. F. Supp. 992 (S. D. N. Y.), 1932 A.M.C. 1444.

Petitioner emphasizes also that the vessel's certificate of inspection required a "crew" of six, including three "deck hands." But the meaning of the term "member of a crew" as used in this Act is not necessarily the same as in legislation regulating the licenses of vessels on the navigable waters of the United States. See *Warner v. Goltra*, 293 U. S. 155, 158. The exception applies, for example, to the *de facto* master of a vessel, even though the master's license for the vessel was issued in the name of another and only the person so named may be considered the master for the purpose of licensing and enrollment statutes. *Partridge v. Parker*, 1939 A. M. C. 508 (E. D. Va.).⁶ The indication from

⁶ Section 1607(c)(4) of the Internal Revenue Code, as amended by Section 614 of the "Social Security Act Amendments of 1939" (Pub. No. 379, 76th Cong., 1st sess.) exempts "an officer or member of the crew of a vessel on the navigable waters of the

the license, though some evidence that the deceased was "necessary" to the navigation of the vessel, does not furnish a workable test on the ultimate issue. Suppose, for example, that petitioners had employed seven men on the "Koal Kraft" when only six were required. What test could the Deputy Commissioner apply to determine which of the seven was "unnecessary" in the navigation of the vessel? It has been held that one hired and paid as a rigger by a company engaged in the construction and repair of vessels but employed mainly in the operation of a power launch assisting the vessels in the shipyards and drydock is covered by the Act even though he was one of the two persons required by the boat's license for its operation. *Moore Dry Dock Co. v. Pillsbury*, 100 F. (2d) 245 (C. C. A. 9th).

Probably Congress intended to include men ordinarily classified as longshoremen and stevedores and those indefinitely described as "harbor workers," but to exclude those ordinarily understood to be members of a "crew." The difficulty in this case is that the deceased's employment partook of the characteristics both of a harbor worker and of a member of a crew, and the task of the Commissioner was to determine the

United States" from the application of the federal unemployment insurance tax. The intention of Congress apparently was to exempt migratory workers because of difficulty of administration and identification. The exception therefore has no application to longshoremen, and would probably be similarly construed in the case of casual workers on the water maintaining a home on land. But the fact that the deceased may have been subject to this tax should not necessarily be decisive of his right to the protection of the Longshoremen's Act. Cf. *Kraft v. A. H. Bull S. S. Co.*, *supra*; but cf. *Antus v. Intercean S. S.*, 1939 A. M. C. 617 (N. D. Ohio, affirmed December 12, 1939 (C. C. A. 6th), not yet reported).

"dominant characteristics." Cf. *Shields v. Utah Idaho Central R. R. Co.*, *supra*, at 187. In making this determination the Deputy Commissioner might reasonably conclude that the deceased's duties of seamanship, however necessary for the navigation of the ship from the point of view of the Inspection Service, were relatively unimportant in determining whether the deceased was a "seafaring man" intended to be excluded from the operations of the Longshoremen's and Harbor Workers' Compensation Act.

In reaching the conclusion that the finding of the Deputy Commissioner was sustained by substantial evidence, the court below emphasized the fact that the deceased's "main duty" was to load and unload coal to be used in fueling other vessels, and that this duty corresponded closely to the function of a longshoreman or stevedore. The petitioners insist, however, that it is not the character of the work, but the place where it is performed that is controlling. Reliance is placed on the cases, cited above, which hold that persons hired as part of the permanent staff of the ship and accompanying the ship on its voyage in the capacity of cooks, engineers, or firemen, are members of the "crew" even though persons performing such functions on land are ordinary landlubbers. But the test of the place where the work is performed is obviously inconclusive, otherwise it would operate to exclude from the coverage of the Act all longshoremen and stevedores injured while working on boats. If the suggested test is to be qualified by the limitation that the work must be performed in furtherance of navigation on the boat while the voyage is in progress, then the deceased was not a

member of a crew for admittedly he "had no duties except when the ship was moored" (R. 22).

The test suggested by the petitioners does not aid their case, even if it be accepted as sound in principle. Certainly, the place as distinguished from the character of the work is not controlling in the absence of some more or less permanent attachment to the boat. "Casual workers" without any continuous connection with any one boat can hardly be considered members of a "crew." Cf. *Kraft v. A. H. Bull S. S. Co.*, *supra*; *The J. P. Schuh*, 223 Fed. 455, 458 (S. D. Ala.). The same would seem to be true of persons employed as longshoremen or repairmen but temporarily engaged in assisting in the navigation of a vessel. Cf. *Southern Pacific Co. v. Locke*, *supra*; *Wheeler Shipyard, Inc. v. Lowe*, 10 F. Supp. 32 (E. D. N. Y.); 13 F. Supp. 863.

The point at which the employee becomes "permanently" attached to the vessel (*Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190, 192-193 (C. C. A. 5th)) must be decided according to the facts of each case. Here, the deceased was employed on an hourly basis and had worked, as called, for a period of twenty-six days on the "Koal Kraft," at the time of the accident. It is difficult to believe that the case would be different if the accident had occurred on the first day, or the seventh, or if there had been some breaks in the continuity of deceased's employment on the "Koal Kraft," during which periods he had worked at odd jobs on land. The inference that the deceased was not "permanently" attached to the vessel in this case is strengthened, of course, by the fact that no provision was made for sleeping quarters on the vessel and the deceased re-

turned to his home every morning. Cf. *Kibadeaux v. Standard Dredging Co.*, 81 F. (2d) 670, 673-674 (C. C. A. 5th).

Thus the facts as to the character of the deceased's duties, the place where they were performed and the extent of his attachment to the vessel are more or less inconclusive. In such circumstances, it may sometimes be helpful to consider the employee's past experience as some indication as to whether he was a "seafaring" man (cf. *Wheeler Shipyard, Inc. v. Lowe, supra*), but this inquiry in the present case is likewise inconclusive. The deceased had worked as a miller in a flour mill in Chicago prior to his employment on the vessel "Koal Kraft" (R. 25). While working on the vessel, however, he sometimes volunteered assistance to the fireman, possibly with expectation of graduating to that position (R. 16, 22). Plainly enough, in his former employment a month prior to the accident, he was not a seaman; but neither was he then a longshoreman or harbor worker.

C. WHETHER A PERSON IS A "MEMBER OF A CREW" SHOULD BE TREATED AS A QUESTION OF FACT FOR THE DETERMINATION OF THE DEPUTY COMMISSIONER

No rule of law has or can be evolved which will eliminate uncertainty as to whether a workman in this "twilight zone" is a "member of a crew." The suggestion that the deputy commissioner determine the question in light of the particular facts of each case finds support in the principles governing the division of function of court and jury and the scope of review of administrative agencies generally. The decisive consideration, however, is that the substitution of the

judgment of the courts for that of the deputy commissioner would defeat the purpose of the Longshoremen's Act.

1. *No rule of law has or can be evolved which will substantially eliminate uncertainty as to whether a person is a "member of a crew"*

The considerations discussed in the analysis of the evidence in the instant case may explain why the decisions "attempt no definition of the crew of a vessel." *Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190 at 192 (C. C. A. 5th); *Diomede v. Lowe*, 87 F. (2d) 296, 298 (C. C. A. 2d). For each case involves "the complexity inherent in the multiple small facts which go to make up the ordinary situations of daily life." *Dickinson, Administrative Justice and the Supremacy of Law*, p. 251.

The decisions of the courts which have interpreted the term "a member of a crew" demonstrate that a definite rule of general application cannot be formulated.

An individual in sole charge of a scow having no means of self-propulsion has been held not to be within the exception of the Act, for the reason that a "crew" is by definition the "ship's complement," a collective noun connoting a group of individuals. *Diomede v. Lowe*, 87 F. (2d) 296 (C. C. A. 2d), certiorari denied, 301 U. S. 682; *De Wald v. Baltimore & O. R. Co.*, 71 F. (2d) 810 (C. C. A. 4th), certiorari denied, 293 U. S. 581. The same result has been reached where a series of scows, each in charge of one man, were in tow of a single tug, even though those in charge of the tug and scow are usually considered one crew in such cases.

Harper v. Parker, 9 F. Supp. 744 (D. Md.). Two men on a scow in tow of a tug, however, were held members of the "composite" crew. *Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190 (C. C. A. 5th). Numbers are not always conclusive. Thus a skiff or rowboat manned by three employees was held not even a vessel within the meaning of the Act for the reason that it had no "permanent" crew or personnel. *Lawson v. Maryland Casualty Co.*, 94 F. (2d) 193 (C. C. A. 5th). But one who was hired for two days to assist in the navigation of a yacht used solely for the purpose of making a motion picture was held a "member" of the crew. *Don Lee, Inc. v. Pillsbury*, S. D. Calif. (1935) unreported; see abridged report, 1935 A. M. C. 341.

Status as a member of a crew is not necessarily permanent. Thus one who was injured in overhauling and disconnecting the engines while the vessel was tied up at a dock during the winter season was held not to be within the exception even though he had been a member of the crew during the preceding season and continued to live on board the vessel. *Antus v. Intercean S. S. Co.*, *supra*. It has been held immaterial in such a case that the injured workman was hired on a five months' basis with the understanding that he would accompany the vessel on its reentry into service. *Taylor v. McManigal*, 89 F. (2d) 583 (C. C. A. 6th). While such employees no doubt continued to be "seafaring men," they were not assisting in the navigation of the vessel at the time of the injury. Cf. *Seneca Washed Gravel Corp. v. McManigal*, 65 F. (2d) 779 (C. C. A. 2d); *T. J. Moss Tie Co. v. Tanner*, 44 F. (2d) 928 (C. C. A. 5th); *Union Oil Co. v. Pillsbury*, 63 F. (2d) 925 (C. C. A. 9th). But where the vessel was laid up for a period of five weeks

and the employee was called to load coal on the day before the vessel reentered service preparatory to the voyage, the employee was held to be a member of a crew. *Jones v. Shepherd*, 20 F. Supp. 345 (S. D. Miss.). Something may depend on the status of the superior officer. A person employed in the triple capacity of "seaman, stevedore, and fisherman" was held a member of a crew when injured while unloading a cargo at the port of call, for the reason that he was acting pursuant to the orders of the master. *DeLuca v. Red Salmon Canning Co.*, 2 Cal. App. (2d), 124. However, one engaged in repairing and conditioning the vessel was held not to be a member of a crew even though acting under the orders of a chief engineer on board the vessel. Cf. *Taylor v. McManigal*, *supra*.

Courts seem to be more reluctant to hold that a longshoreman has become a member of a crew than that a member of a crew has become a longshoreman. Thus, one who was hired as a longshoreman with the special duty of aiding in the navigation of a lighter was held not to be a member of a crew when injured in performing that special duty. *Southern Pacific Co. v. Locke*, 1 F. Supp. 992 (S. D. N. Y.). And a workman employed to paint motorboats who occasionally towed motorboats to purchasers was not a member of a crew when injured in delivering the boats. *Wheeler Shipyard, Inc. v. Lowe*, 19 F. Supp. 22 (E. D. N. Y.). Such men, of course, are not "seafaring men." But an employee hired as an alternate deck-hand may become a member of a crew if temporarily taking the place of the regular deck-hand. Cf. *Kraft v. A. H. Bull S. S. Co.*, 28 F. Supp. 437 (S. D. N. Y.).

2. *The principles governing the division of function of court and jury furnish a persuasive analogy*

The confusion in the decisions is due to the nature of the problem. The question presented is one of those which, for want of a better phrase, may be called a "mixed question of fact and law." Cf. *Pearce v. Lansdowne*, 62 L. J. R. (N. S.) (Q. B. Div. 1893) 441, 444. The application of the general standards prescribed by the Act and the decisions must necessarily vary according to the particular circumstances of each case. No definite rule of law has been established or could be established which would determine their application in every conceivable situation. And where the law is couched in such general terms, its application to particular circumstances should be left to the trier of the facts.

Such was the rule at common law. See Thayer, *Preliminary Treatise on Evidence*, 249-253 (1898); Bohlen, *Mixed Questions of Law and Fact*, 72 U. of Pa. L. Rev., 111, 115. The negligence cases are the most familiar examples, but the rule is the same where the applicable standard is more comparable to the one at bar. In *McLanahan v. Universal Ins. Co.*, 1 Pet. 170, an action was brought on a policy of insurance for the loss of a vessel. One defense was that the ship was unseaworthy because the master and sufficient crew were not on board at commencement of the homeward voyage. This Court reversed a directed verdict for the defendant. Mr. Justice Story, for the Court, observed (p. 184):

What is a competent crew for the voyage? at what time such crew should be on board? what is proper pilot ground? what is the course and usage of trade in relation to the

master and crew being on board, when the ship breaks ground for the voyage? are questions of fact, dependent upon nautical testimony; and are incapable of being solved by a court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs.

The function of the jury is the same where the general standard to be applied is one embodied in a statute. The case of *Pearce v. Lansdowne, supra*, is illuminating. In that case the plaintiff, a potman at a public house, brought an action against his employer under an employers' liability act which expressly exempted from its operation a "domestic or menial servant." The jury gave a verdict in favor of the plaintiff subject to the question, reserved by the court, whether the plaintiff was within the exception of the act. Thereafter the County Court Judge heard evidence and concluded that the plaintiff was a "domestic or menial servant" and not within the coverage of the statute. On appeal to the Queen's Bench Division, the judgment was affirmed. The court held that the question was one of fact which should have been left to the jury but that on request of counsel the appellate court was empowered to dispose of the matter finally where the facts were not in dispute. On the issue of fact, the members of the court were agreed that the plaintiff was a domestic or menial servant and not within the coverage of the act. In the course of his opinion, as reported in 69 L. T. R. 316, Williams, J., observed:

I believe that a great part of the difficulty in this case—and there is a great deal of difficulty in it—has arisen from the distinction between

the functions of the judge and those of the jury not being sufficiently kept in mind. The scheme of the English law is not to lay down accurate verbal definitions which shall draw a hard-and-fast line to determine every case as it arises, but has always been to draw elastic definitions, not absolute hard and rigid definitions, and to leave it to the jury in each case to say whether the particular facts of the case bring it within or without the definition.

After observing that the principle is the same where the facts are agreed, he added (*Id.*, p. 317) :

* * * no one can doubt that, on the facts, it is possible that reasonable persons may take different views as to whether the plaintiff was "a labourer, servant in husbandry, journeyman artificer, handicraftsman, miner, or otherwise engaged in manual labor," or not, and it is also possible that on the admitted facts they would take different views as to whether or not he was a "domestic or menial servant." Under these circumstances I wish to say as emphatically as I can that it seems to me here that the County Court judge took upon himself the functions of the jury without any occasion for so doing.

Concluding that a rule of practice permitted the appellate court to make a final settlement of the matter where all the facts were before it, the judge defined the functions of the court under these circumstances as follows (*Id.*, p. 318) :

We are entitled now to instruct ourselves in the same way as if we were summing up to a jury, and then, applying the instructions to the admitted facts of the case, we shall be within

the jurisdiction assumed by the Court of Appeal in giving such a judgment as shall finally settle the matter, though we must, which I hesitate to do, draw inferences of fact which ought to have been drawn by the jury.

Judge Collins was of the same opinion. (*Id.*, 318-319.)

3. *Substitution of the judgment of the courts for that of the deputy commissioner would defeat the purpose of the act.*

This Court has frequently held that where the statutes enforced by an administrative agency are defined in general terms the ultimate findings of fact of the administrative body are likewise conclusive if supported by evidence and do "not violate any principle of law." *Voehl v. Indemnity Insurance Co.*, 288 U. S. 162, 166, 169. That case arose under the Longshoremen's Act and the question was whether the injury arose out of and in the course of the employment. The determination of the deputy commissioner upon this issue was held to be conclusive if supported by evidence. See also *Elmhurst Cemetery Co. v. Commissioner*, 300 U. S. 37, 40; *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 304; *Helvering v. National Grocery Co.*, 304 U. S. 282, 294; *Manufacturers' Railway Co. v. United States*, 246 U. S. 457, 481; *Pennsylvania Company v. United States*, 236 U. S. 351, 361; *I. C. C. v. Alabama Midland R. R.*, 168 U. S. 144, 170; Schafzman, *The Interstate Commerce Commission*, Vol. II, p. 441; Bohlen, 72 U. of Pa. L. Rev. 111, 115; Dickinson, *Administrative Justice and the Supremacy of Law*, pp. 50, 71, cf. 312, 314-315. The principle has been given application even where the primary or evi-

dential facts are not in dispute; the inferences to be drawn from the facts are for the determination of the administrative agency. *United States v. L. & N. R. R.*, 235 U. S. 314; *Federal Trade Commission v. Pacific States Paper Trade Association*, 273 U. S. 52, 61; Cf. *Elmhurst Cemetery Co. v. Commissioner*, *supra*, at p. 40; *Helvering v. National Grocery Co.*, *supra*, at 294.

The scope of judicial review, of course, must vary according to the nature and purpose of the Act in question. The principle suggested, however, is peculiarly applicable to judicial review of compensation orders entered pursuant to the statutory scheme of the Longshoremen's Act. The purpose of Congress, to provide a "prompt" and "inexpensive" (*Crowell v. Benson*, 285 U. S. at 46-47) method for the disposal of claims is clear from the face of the Act. Compensation becomes due fourteen days after the employer has knowledge of the injury (Sec. 14(b)). Where the right to compensation is controverted and an award is made by a deputy commissioner, a penalty of twenty percent is assessed for failure to make compensation within ten days after payment is due (Sec. 14(f)). *Candado Stevedoring Corp. v. Lowe*, 85 F. (2d) 119 (C. C. A. 2d); *Arrow Stevedore Co. v. Pillsbury*, 88 F. (2d) 446 (C. C. A. 9th). If the employer fails to make payment within thirty days after compensation is due, the deputy commissioner may enter a supplementary order directing payment, on which judgment and execution may be had in the appropriate federal district court (Sec. 18). In order that the burdens, delays, and hazards of litigation may not be used to induce employees to make

disadvantageous agreements, any waiver of the right to compensation is forbidden by Congress (Sec. 15(b)), agreements for compensation without the approval of the Commission are prohibited (Sec. 16),⁷ and the district attorney is directed to appear on behalf of the deputy commissioner and defend compensation orders (45 Stat. 490). To minimize the law's delays, the Act prescribes certain limitations on the granting of interlocutory injunctions staying the payment of compensation (Sec. 21(b)).

This Court has recognized that in order to achieve the purposes of the Act the determinations of the deputy commissioner must be given finality if supported by substantial evidence, at least where no constitutional question of jurisdiction is presented. In *Crowell v. Benson*, 285 U. S. at 46-47, this Court said:

To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circum-

⁷ Section 8 (i) permits the Deputy Commissioner to approve settlements with the approval of the Commissioner in certain limited classes of cases. Subject to this exception Section 16 forbids compromise of claims even with the approval of the Deputy Commissioner or of the Commissioner.

stances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded.

For the courts to undertake to apply the general standard prescribed by the statute to the endless variety of circumstances which may arise in the administration of the Act is at once to invite and to create the cause of litigation, and thus to defeat the purpose of the Act. In the past as much as four years has sometimes elapsed between the date of application for judicial review under Section 21 (b) and final disposition in the courts.⁸

⁸ This statement is based upon data in the files of the United States Employees' Compensation Commission relating to the following twenty-five typical cases: *Union Stereodoring Corp. v. Norton*, 98 F. (2d) 1012 (C. C. A. 3d) (2 yrs., 1 mo., 16 days); *Hartford Accident & Indemnity Co. v. Hoage*, 77 F. (2d) 381 (App. D. C.), certiorari denied, 296 U. S. 609 (2 yrs., 11 mos., 24 days); *Weyerhaeuser Timber Co. v. Marshall*, 102 F. (2d) 78 (C. C. A. 9th) (2 yrs., 13 days); *Texas Employers' Insurance Assn. v. Sheppard*, 62 F. (2d) 122 (C. C. A. 5th) (10 mos. 20 days); *Bethlehem Shipbuilding Corp., Ltd. v. Cardillo*, 102 F. (2d) 299 (C. C. A. 1st), certiorari denied, 307 U. S. 645 (2 yrs., 2 mos., 30 days); *Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190 (C. C. A. 5th) (1 yr., 4 mos., 20 days); *Continental Casualty Co. v. Lawson*, 64 F. (2d) 802 (C. C. A. 5th) (1 yr., 2 mos., 5 days); *New Amsterdam Cas. Co. v. McManigal*, 87 F. (2d) 332 (C. C. A. 2d) (1 yr., 5 mos., 9 days); *Norton v. Travelers Ins. Co.*, 105 F. (2d) 122 (C. C. A. 3d) (1 yr., 10 mos., 29 days); *Moore Dry Dock Co. v. Pillsbury*, 100 F. (2d) 245 (C. C. A. 9th) (1 yr., 5 mos., 27 days); *Maryland Cas. Co. v. Lawson*, 101 F. (2d) 732 (C. C. A. 5th) (1 yr., 5 mos., 10 days); *Southern S. S. Co. v. Norton*, 101 F. (2d) 825 (C. C. A. 3d) (1 yr., 3 mos., 30 days); *Luckenbach S. S. Co. v. Norton*, opinion on final judgment not reported, interlocutory injunction denied, 21 F. Supp. 707 (E. D. Pa.) (1 yr., 8 mos., 22 days); *Chas. M. McCormick Lumber Co. v. Marshall* (not reported, W. D. Wash., July 6, 1937) (4 yrs., 5 mos., 8 days); *W. J. Jones & Sons, Inc. v. Marshall* (not reported,

If payment of compensation is stayed by injunction, the claimant may be denied the means of support in the interim, even though it may ultimately develop that the award was in accordance with law. The instant case sufficiently illustrates the danger of delay. The accident occurred on October 31, 1937, and an award was made on February 21, 1938 (R. 44). The application for review under Sec. 21 (b) was filed by the employer on March 3, 1938 (R. 2), and a temporary injunction staying payment was granted on March 8, 1938, which was made permanent on July 8, 1938 (R. 71-72). The decision of the court below reversing the order of injunction was not rendered until May 11, 1939 (R. 84), and an order was thereafter entered staying the mandate until further order, on condition that the petitioners promptly file their petition for writ of certiorari in this court (R. 112). Such delays may make some compromise essential in order that the claimant may receive any effective compensation.* The court of last resort

D., Ore.) (4 yrs., 9 mos., 7 days); *Metropolitan Cas. Ins. Co. v. Hoage*, 72 F. (2d) 175 (App. D. C.) (1 yr., 10 mos., 26 days); *American Employers' Ins. Co. v. Cardillo* (not reported, App. D. C.) (1 yr., 6 mos., 4 days); *Voehl v. Indemnity Ins. Co.*, 288 U. S. 162 (2 yrs., 2 days); *United States Fidelity & Guaranty Co. v. Lairson*, 15 F. Supp. 116 (S. D. Ga.) (11 mos., 26 days); *Baltimore & O. R. Co. v. Clark*, 59 F. (2d) 595 (C. C. A. 4th) (5 mos., 5 days); *Georgia Casualty Co. v. Hoage*, 59 F. (2d) 870 (App. D. C.) (1 yr., 1 mo., 30 days); *United States Fidelity & Guaranty Co. v. Hoage* (not reported, App. D. C.) (2 yrs., 6 mos., 26 days); *Hartford Accident & Indemnity Co. v. Hoage*, 85 F. (2d) 420 (App. D. C.) (9 mos., 11 days); *New Amsterdam Cas. Co. v. Hoage* (not reported, App. D. C.) (2 yrs., 7 mos., 7 days); *International Mercantile Marine Co. v. Lowe*, 93 F. (2d) 663 (C. C. A. 2d), certiorari denied, 304 U. S. 565 (3 yrs., 4 mos., 22 days).

* In the unreported case of *Charles M. McCormack Lumber Co. v. Marshall* (W. D. Wash., July 6, 1937), the employer made ap-

may, of course, ultimately conclude that the award should be set aside but such a decision may merely demonstrate that reasonable men can differ as to the application of Section 3 in the circumstances of a particular case. And to deny compensation in such cases is to fail to give effect to the presumption created by the express terms of Section 20, *infra*, p. 44.

The lower federal courts have not succeeded in evolving a rule of law sufficiently definite and certain in application to insure the "prompt" and "inexpensive" disposition of compensation claims by the courts. No such rule, we submit, can be evolved.

The record of decisions undertaking to define the permissible scope of the Federal Employers' Liability Act is instructive. This Court early ruled that the Act extended to cases where the employee was engaged in work closely connected with interstate commerce: under that test an employee injured while carrying rivets for repair of a bridge used for both interstate and intra-state commerce was held to be within the protection of the Act. *Pedersen v. Delaware Lack. & West. R. R.*, 229 U. S. 146. The Court soon undertook to determine the application of this test to a yard clerk who was struck while crossing the yard to meet an interstate train to

application for review under Sec. 21 (b) on October 31, 1932, and an interlocutory injunction was granted on January 28, 1933. On July 6, 1937, more than four years later, the district attorney consented to the entry of an order setting aside the compensation award. The consideration to the claimant for this agreement, if any, is not shown by the court's order. In *Lykes Bros. Ripley Steamship Co., Inc. v. Sheppard* (unreported), decided November 13, 1935, the decree of the District Court (E. D. Tex.) expressly recites the consideration.

check the car numbers and seals, *St. Louis & San Francisco Ry. v. Seale*, 229 U. S. 156; to a locomotive fireman who was struck while crossing the tracks to his boarding house after oiling and inspecting an engine preparatory to an interstate run, *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248; to one who was killed while moving intrastate freight across the city preparatory to interstate commerce, *Illinois Central R. R. v. Behrens*, 233 U. S. 473; to a switchman riding on a car used in interstate commerce, *Toledo, St. L. & West. R. R. Co. v. Slavin*, 236 U. S. 454; to a brakeman who was on an intrastate car for the purpose of cutting it out in order that an interstate train might proceed, *New York Central R. R. v. Carr*, 238 U. S. 260; to the mining of coal in the railroad's mine for the railroad's use in interstate commerce, *Delaware, Lack. & West. R. R. v. Yurkonis*, 238 U. S. 439; to the distribution of cars of an interstate train to make room for another interstate train, *Seaboard Air Line v. Koennecke*, 239 U. S. 352; to the making of a trial run to test an engine for use in interstate commerce, *Southern Railway v. Lloyd*, 239 U. S. 496; and to the switching of "empties" preparatory to switching coal cars coming from outside the state, *Pennsylvania Co. v. Donald*, 239 U. S. 50. Three years after the decision of the *Pedersen* case, the rule was modified in *Shanks v. Delaware Lack. & West. R. R.*, 239 U. S. 556, the word "transportation" being substituted for the word "commerce."

The decisions reflect the difficulty of making consistent application of any test in a variety of factual circumstances. Thus, for a time at least, one who oper-

ated a signal tower and pumping station for the supply of water for interstate and intrastate trains was held to be within the protection of the Act (*Erie R. R. Co. v. Collins*, 253 U. S. 77, overruled, *Chicago & E. I. R. Co. v. Commission*, 284 U. S. 296), but a switchman taking coal cars into a chute for use on interstate trains was found to be engaged in intrastate commerce, *Chicago, Burlington & Q. R. R. v. Harrington*, 241 U. S. 177. One who was employed on a train which never left the state, but carried coal cars, some of which went outside the state, to a point where it was taken over by another crew for transportation to scales for weighing, was held to be engaged in interstate commerce (*Philadelphia & Read. Ry. Co. v. Hancock*, 253 U. S. 284), but an employee of a logging company engaged as a brakeman on trains transporting logs over the company's railroad to tide-water where the logs were sold and then moved outside the state, was not within the protection of the Federal Government, *McCluskey v. Marysville & Northern Ry. Co.*, 243 U. S. 36. An employee unloading goods from outside the state was held to be engaged in interstate commerce, *Baltimore & O. S. W. R. R. v. Burtch*, 263 U. S. 540, but not if the unloading occurred seventeen days after the arrival of the goods, *Lehigh Valley R. R. Co. v. Barlow*, 244 U. S. 183.¹⁰ Whether or not as a consequence of such decisions, litigation on this question increased rather than decreased in the course of time.¹¹ It is not clear that the decisions of this Court reached the only permissible result in the particular cases. Cer-

¹⁰ The decisions on the Federal Employers' Liability Act are fully discussed in Schoene and Watson, *Workmen's Compensation on Interstate Railways*, 47 Harv. L. Rev. 389.

¹¹ See Schoene and Watson, *supra*, p. 407.

tainly they did not facilitate the "prompt" and "inexpensive" disposition of the employee's claims, whatever may have been the need for judicial review where a question of constitutional jurisdiction was presented. A noticeable decline has been remarked in the number of cases of this character which this Court has accepted for review since the October Term, 1931. See Frankfurter and Hart, *Supreme Court at October Term, 1932*, 47 Harv. L. Rev., 245, 270, n. 47.

In the past the courts have not been more successful in determining the scope of the provision excepting a "member of a crew." In this case, certainly, reasonable men may differ as to whether the deceased was a "member of a crew." In short, the order of the Deputy Commissioner is supported by substantial evidence and should, therefore, be affirmed.

It is important that the respondent's position should not be misunderstood. No claim is made that the deputy commissioners are necessarily better qualified than the courts to decide the question presented. There are no economic or social problems of great complexity in this case requiring special training and experience for sound solution. We do contend, however, that the question presented is one as to which reasonable men may well and even usually disagree. Nothing is to be gained therefore by substituting the judgment of the courts for that of the deputy commissioners, and the litigation which would be caused by denying finality to the administrative determination would tend to defeat the legitimate purpose of the Act.

CONCLUSION

It is respectfully submitted that the decision of the court below was correct and should be affirmed.

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JANUARY, 1940.

APPENDIX

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT,
C. 509, 44 STAT. 1424, 33 U. S. C. and U. S. C. SUPP. IV, SEC. 901
ET SEQ.

SEC. 2. When used in this chapter—

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

SEC. 3. *Coverage.*—(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

SEC. 5. *Exclusiveness of liability.*—The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative,

husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

SEC. 8. *Compensation for disability.*—Compensation for disability shall be paid to the employee as follows:

(c) Permanent partial disability: In case of disability partial in character but permanent in quality, the compensation shall be 66 $\frac{2}{3}$ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability paid in accordance with subdivision (b) of this section, and shall be paid to the employee, as follows:

(21) Other cases: In all other cases in this class of disability the compensation shall be 66 $\frac{2}{3}$ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of

the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(i) In cases under subdivision (c) (21) and subdivision (e) of this section, whenever the deputy commissioner determines that it is for the best interests of an injured employee entitled to compensation, he may, with the approval of the Commission, approve agreed settlements of the interested parties, discharging the liability of the employer for such compensation, notwithstanding the provisions of section 915 (b) and section 916 of this chapter: *Provided*, That the sum so agreed upon shall be payable in installments as provided in section 914 (b), which installments shall be subject to commutation under section 914 (j): *And provided further*, That if the employee should die from causes other than the injury after the Commission has approved an agreed settlement as provided for herein, the sum so approved shall be payable, in the manner prescribed in this subdivision, to and for the benefit of the persons enumerated in subdivision (d) of this section. [As amended May 24, 1934, c. 354, §§ 2, 3, 48 Stat. 806; June 25, 1938, c. 685, §§ 4, 5, 52 Stat. 1165.]

SEC. 14. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter com-

pensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the commission, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in section 921 and an interlocutory injunction staying payments is allowed by the court as provided therein. [As amended June 25, 1938, c. 685, § 7. 52 Stat. 1167.]

(i) Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any award shall be made upon order of the deputy commissioner.

SEC. 15. (a) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this chapter shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this chapter shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$1,000.

(b) No agreement by an employee to waive his right to compensation under this chapter shall be valid.

SEC. 16. No assignment, release, or commutation of compensation or benefits due or payable under this chapter, except as provided by this chapter, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

SEC. 17. *Compensation a lien against assets.*—Any person entitled to compensation under the provisions of this chapter shall have a lien against the assets of the carrier or employer for such compensation without limit of amount, and shall, upon insolvency, bankruptcy, or reorganization in bankruptcy proceedings of the carrier or employer, or both, be entitled to preference and priority in the distribution of the assets of

such carrier or employer, or both: [As amended June 25, 1938, c. 685, sec. 8, 52 Stat. 1167.]

SEC. 18. *Collection of defaulted payments.*—In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 919 of this chapter, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office; or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the Supreme Court of the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall, upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings

to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

SEC. 19. (a) Subject to the provisions of section 913 of this chapter a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

SEC. 20. *Presumptions.*—In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

SEC. 21. *Review of compensation orders.*—(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for

the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District

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of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter.

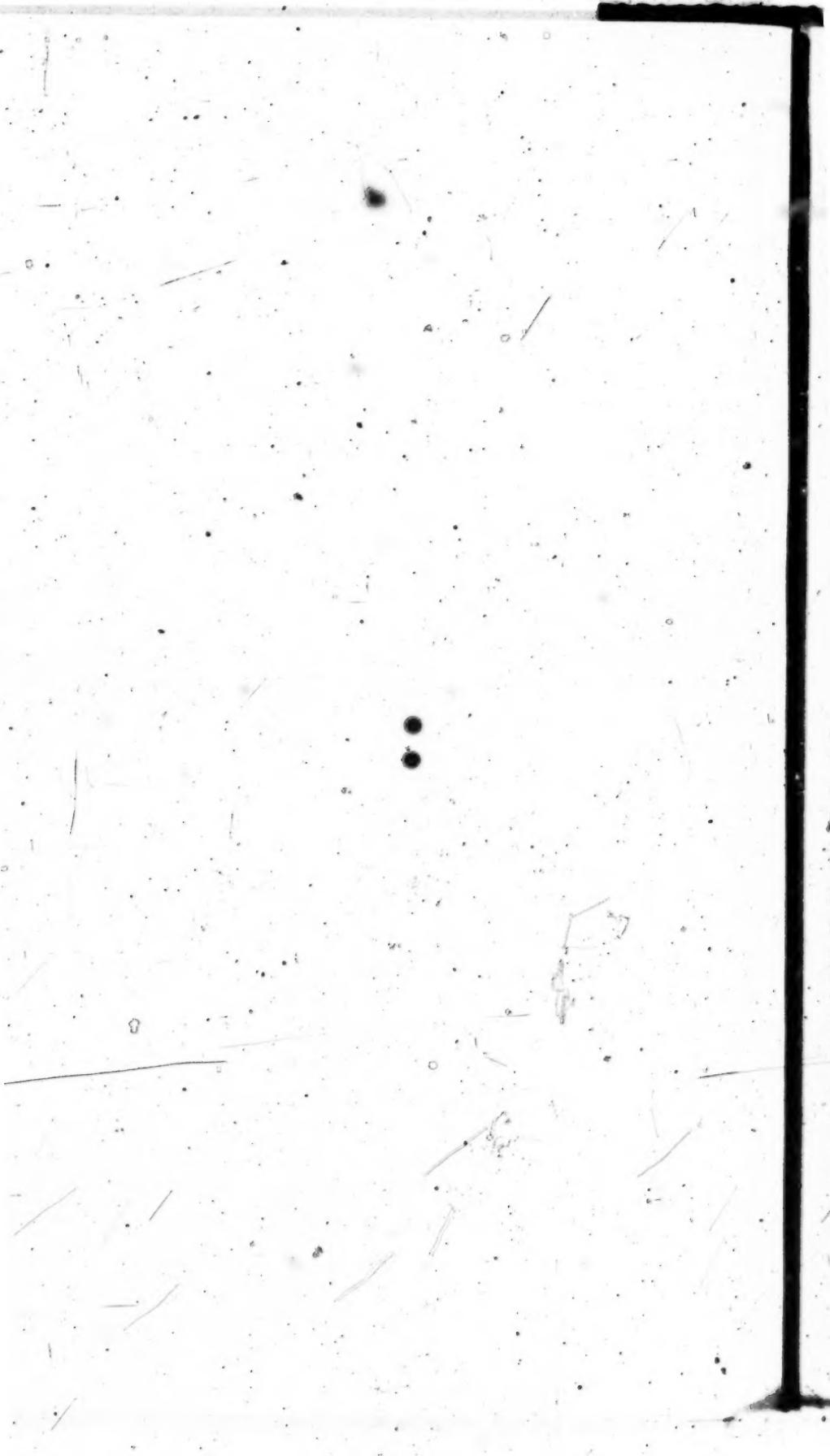
SEC. 23. (a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

SEC. 24. *Witnesses.*—No person shall be required to attend as a witness in any proceeding before a deputy commissioner at a place outside of the State of his residence and more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him; but the testimony of any witness may be taken by deposition or interrogatories according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the Supreme

Court of the District of Columbia if the case is pending in the District.

Act of May 4, 1928, c. 502, 45 Stat. 490 (33 U. S. C. Supp. IV, Sec. 921a):

That in any court proceedings under section 21 or other provisions of the Longshoremen's and Harbor Workers' Compensation Act, it shall be the duty of the district attorney of the United States in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the United States Employees' Compensation Commission or its deputy commissioner when either is a party to the case or interested, and to represent such commission or deputy in any court in which such case may be carried on appeal.



SUPREME COURT OF THE UNITED STATES.

No. 262.—OCTOBER TERM, 1939.

South Chicago Coal & Dock Company
and London Guarantee & Accident
Company, Ltd., Petitioners,
vs.
Harry W. Bassett, Deputy Commis-
sioner, United States Employees'
Compensation Commission, 10th
Compensation District.

On Writ of Certiorari to
the United States Cir-
cuit Court of Appeals
for the Seventh Circuit.

[February 26, 1940.]

Mr. Chief Justice HUGHES delivered the opinion of the Court.

John Schumann, an employee of petitioner, South Chicago Coal Dock Company, was drowned while serving his employer on a vessel in navigable waters of the United States. His widow was awarded compensation by the deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act.¹ The deputy commissioner found that decedent was performing services on the vessel as a laborer and fell from the vessel into the water. The employer and its surety brought suit in the District Court to restrain the enforcement of the award, contending that decedent was employed as a member of the crew and hence that compensation is not payable. The District Court granted a trial *de novo* and held that the decedent was a member of the crew vacated the award.

The Court of Appeals found that the evidence before the District Court was similar to that heard by the deputy commissioner; that the facts were not in dispute; that the District Court in reversing the finding of the deputy commissioner was precluded from weighing the evidence, being required to examine the record and ascertain whether there was any evidence to support the commissioner's finding. Holding that there was such evidence, the Court

of Appeals reversed the decree of the District Court and directed the dismissal of the bill of complaint. 104 F. (2d) 522. Because of an alleged conflict with a decision of the Court of Appeals of the Fifth Circuit in the case of *Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190, we granted certiorari. October 9, 1939.

The statute provides specifically in Section 3 as to "Coverage", that no compensation shall be payable in respect of the disability or death of a "master or member of a crew of any vessel".² And these persons were excluded from the definition of the term employee. Sec. 2(3).³

It appears that the vessel was a lighter of 312 net tons used for fueling steamboats and other marine equipment. It was licensed to operate in the Calumet River and Harbor and in the Indiana River and Harbor. The Court of Appeals thus summarized its operations: "It supplied coal to other vessels on their order, each operation consuming only a couple of hours. It had no sleeping or eating quarters. Its certificates of inspection required that 'Included in the entire crew hereinafter specified and designated must be 1 licensed master and pilot, 1 licensed chief engineer, three seamen, 1 fireman'; if deceased were counted as a member of the crew, the full complement of the ship was present, otherwise not". The captain testified before the deputy commissioner that he had five men on the boat with him, one engineer, fireman and three "deckhands", the decedent being one of the latter. The Court of Appeals described his chief task as "facilitating the flow of coal from his boat to the vessel being fueled—removing obstructions to the flow with a stick. He performed such additional tasks

² The entire text of Section 3 is as follows:

"See. 3. *Coverage*.—(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another". 33 U. S. C. 903.

³ 33 U. S. C. 902(3).

as throwing the ship's rope in releasing or making the boat fast. He performed no navigation duties. He occasionally did some cleaning of the boat but he did not work while the boat was en route from dock to the vessel to be fueled." The Court of Appeals thought it significant that his only duty relating to navigation was the incidental task of throwing the ship's line; that his primary duty was to free the coal if it stuck in the hopper while being discharged into the fueled vessel while both boats were at rest; that he had no duties while the boat was in motion; that he was paid an hourly wage; that he had no 'articles'; that he slept at home and boarded off ship; that he was called very early in the morning each day as he was wanted; that while he had worked only three weeks, and it might have been possible that he would have been retained for years to come, his employment was somewhat akin to temporary employment.

In *Nogueira v. New York, New Haven & Hartford R. Co.*, 281 U. S. 128, we had occasion to consider the purpose and scope of the Longshoremen's and Harbor Workers' Compensation Act. Its general scheme was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injury occurring upon the navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law. We had held that one engaged as a stevedore in loading a ship lying in port in navigable waters was performing a maritime service and that the rights and liabilities of the parties were matters within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52. But the Court had also held that in the case of a longshoreman who was injured on the land, although engaged in unloading a vessel, the local law governed and hence the workmen's compensation law of the State applied. *State Industrial Commission v. Nordenholz Corporation*, 259 U. S. 263. The distinction had thus been maintained between injuries on land and those suffered by persons engaged in maritime employment on a vessel in navigable waters. As to the latter, no doubt was entertained of the power of Congress to modify the admiralty law and to provide for the payment by employers of compensation.⁴ And in thus providing Congress had constitutional authority to define the classes of such

⁴ See *Waring v. Clarke*, 5 How. 441, 457, 458; *The Lottawanna*, 21 Wall. 558, 577; *Butler v. Boston Steamship Co.*, 130 U. S. 527, 556, 557; *In re Garnett*,

employees who should receive compensation and to exclude those described in Section 3. *Nogueira v. N. Y., N. H. & H. R. Co.*, *supra*.

The legislative history of the exception now before us throws light upon the intention of Congress. For those employees who are entitled to compensation, the remedy under the Act is exclusive. Section 5.⁵ This made inapplicable to such employees the provision of Section 33 of the Merchants Marine Act (called the Jones Act) which carried to "seamen" at their election the benefit of the provisions of the Federal Employers' Liability Act.⁶ The bill, which became the Longshoremen's and Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a citizen of the United States.⁷ They preferred however to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones Act, and the bill was changed accordingly so as to exempt "seamen". Then, in its final passage, the words "a master or member of a crew" were substituted for "seamen".⁸ We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable waters, in the work of loading or unloading, were "seamen". *International Stevedoring Company v. Haverty*, 272 U. S. 50; *Northern Coal Co. v. Strand*, 278 U. S. 142. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation act. *Southern Pacific Co. v. Jensen*, 244 U. S. 205. We think it is clear that Congress in finally adopting the phrase "a master or member of a crew" in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel⁹ and to whom state compensation statutes were inapplicable. The question is whether the decedent in this instance fell within that class.

⁵ 33 U. S. C. 905.

⁶ 41 Stat. 1007.

⁷ House Rep. No. 1767, 69th Cong., 2d sess., pp. 1, 2, 20.

⁸ Cong. Rec., 69th Cong., 2d sess., vol. 68, pt. 5, pp. 5402, 5403, 5908; *Nogueira v. N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 138.

⁹ Except where they are engaged "to load or unload or repair any small vessel under eighteen tons net". See § 3(a)(1), 33 U. S. C. 903(a)(1).

So far as the decision that this employee, who was at work on this vessel in navigable waters when he sustained his injuries, was or was not "a member of a crew" turns on questions of fact, the authority to determine such questions has been confided by Congress to the deputy commissioner.¹⁰ Hence the Court of Appeals correctly ruled that his finding, if there was evidence to support it, was conclusive and that it was the duty of the District Court to ascertain whether it was so supported and, if so, to give it effect without attempting a retrial. We have so held with respect to the conclusiveness of the finding of the deputy commissioner that an injury to an employee arose "out of and in the course of employment", *Voehl v. Indemnity Insurance Co.*, 288 U. S. 162, 166; as to the finding of the dependency of a claimant for compensation, *L'Hoste v. Crowell*, 286 U. S. 528, *The Admiral Peoples*, 295 U. S. 649, 653, 654; and as to the finding that the employee had committed suicide and hence that compensation was not payable, *Del Vecchio v. Bowers*, 296 U. S. 280, 287. In the *Del Vecchio* case the question was with respect to the application of the exception made by paragraph (b) of Section 3 with respect to "Coverage", and we see no reason for a different view as to the application of paragraph (a)(1) of the same section.

Petitioners urge that the question whether the decedent was a member of a "crew" was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a "crew" as distinguished from a long-shoreman or laborer at work upon the vessel. We are unable so to conclude.

The word "crew" does not have an absolutely unvarying legal significance. As Mr. Justice Story said in *United States v. Winn*, 3 Sumn. 209,¹¹ the general sense of the word crew is "equivalent to ship's company" which would embrace all the officers as well as the common seamen. But it was observed that the laws upon maritime subjects sometimes used the word crew in that general sense and "sometimes in other senses, more limited and restrained". "It is sometimes used to comprehend all persons composing the ship's company, including the master; sometimes to comprehend the officers and common seamen, excluding the master; and sometimes to

¹⁰ 33 U. S. C. 919(a), 921.

¹¹ 28 Fed. Cas. 733, Case No. 16,740.

comprehend the common seamen only, excluding the master and officers". It was therefore deemed necessary to consider the context of the particular use of the term and the object to be accomplished by the enactment under consideration. In *The Bound Brook*, 146 Fed. 160, 164, it was said that "When the 'crew' of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board". Judge Hough in *The Buena Ventura*, 243 Fed. 797, 799, thought that statement was a fair summary, and in his view one who served the ship "in her navigation" was a member of the "crew". *Id.*, p. 800. See, also, *Seneca Gravel Co. v. McManigal*, 65 F. (2d) 779. Recently, in considering the application of the Jones Act to "any seaman", we adverted to the "range of variation" in the use of the word "crew", and it was again emphasized that what concerned us in that case, which had relation to the status of a "master", was "not the scope of the class of seamen at other times and in other contexts". We said that our concern there was "to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained". *Warner v. Goltra*, 293 U. S. 155, 158.

That is our concern here in construing this particular statute—the Longshoremen's and Harbor Workers' Compensation Act—with appropriate regard to its distinctive aim. We find little aid in considering the use of the term "crew" in other statutes having other purposes. This Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (*International Stevedoring Company v. Haverty, supra*), were still regarded as distinct from members of a "crew". They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation. See *De Wald v. Baltimore & Ohio R. Co.*, 71 F. (2d) 810; *Diomedes v. Lowe*, 87 F. (2d) 296; *Moore Dry Dock Co. v. Pillsbury*, 100 F. (2d) 245.

Regarding the word "crew" in this statute as referring to the latter class, we think there was evidence to support the finding of the deputy commissioner. The fact that the certificate of inspection called for three "deckhands" and that the captain included the

decedent to make up that complement is not controlling. The question concerns his actual duties. These duties, as the Court of Appeals said, did not pertain to navigation, aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker. What the court considered as supporting the finding of the deputy commissioner was that the primary duty of the decedent was to facilitate the flow of coal to the vessel being fueled, that he had no duties while the boat was in motion, that he slept at home and boarded off ship and was called each day as he was wanted and was paid an hourly wage. Workers of that sort on harbor craft may appropriately be regarded as "in the position of longshoremen or other casual workers on the water". *Scheffler v. Moran Towing Co.*, 68 F. (2d) 11, 12. Even if it could be said that the evidence permitted conflicting inferences, we think that there was enough to sustain the deputy commissioner's ruling.

The judgment of the Court of Appeals is affirmed.

Affirmed.

Mr. Justice MURPHY took no part in the consideration and decision of this case.

A true copy.

Test:

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